

1
91-693

Supreme Court, U.S.
FILED
OCT 24 1991
OFFICE OF THE CLERK

CASE NO.

In The
SUPREME COURT OF THE UNITED STATES

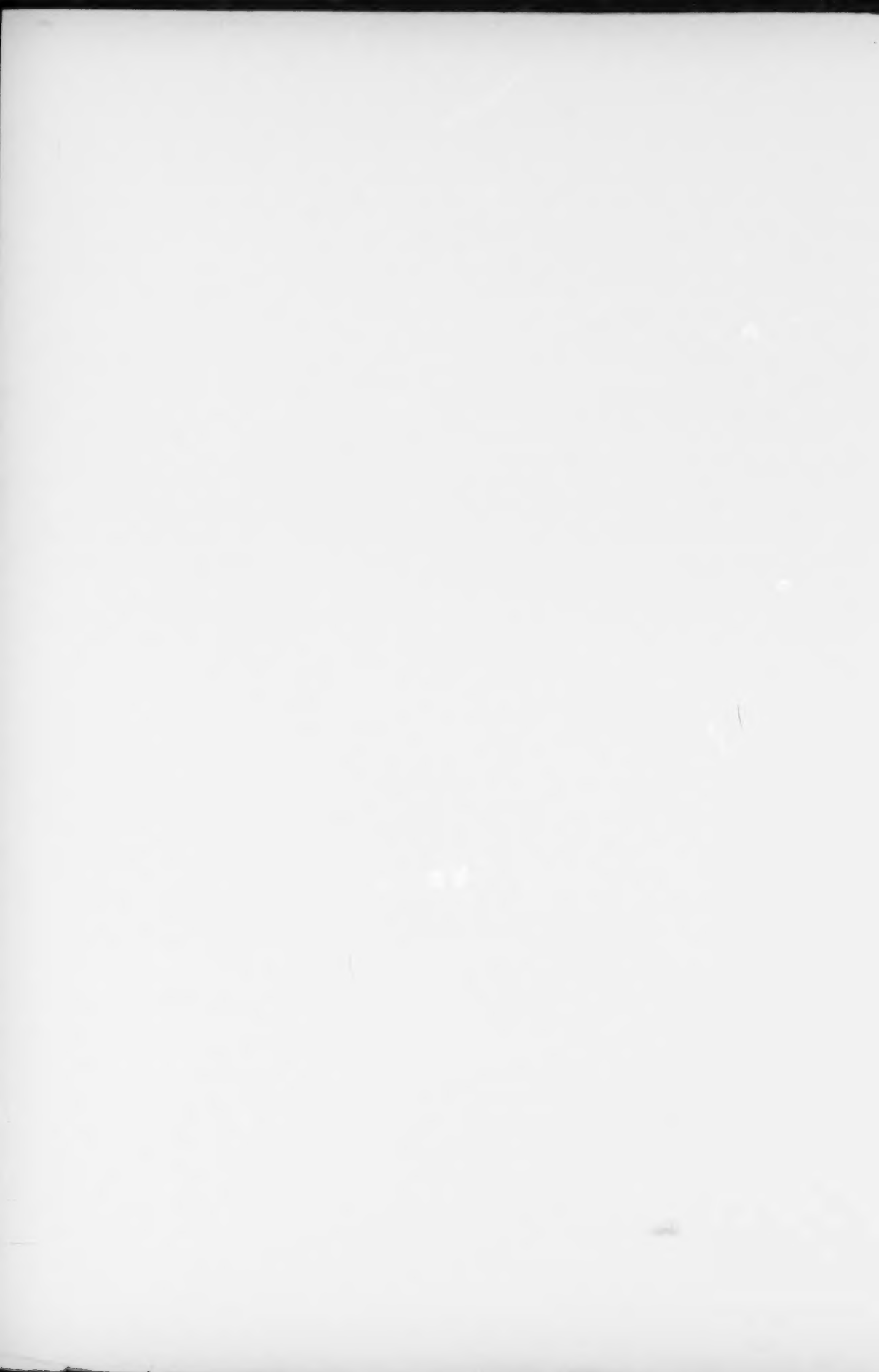
October Term, 1991

FEDERAL INSURANCE COMPANY,
Petitioner,
vs.
CITY OF LAKE LAND,
Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Richard J. Ovelmen
(Counsel of Record)
Landon K. Clayman
BAKER & MCKENZIE
1600 Barnett Tower
701 Brickell Avenue
Miami, Florida 33131
(305) 789-8900

Attorneys for Petitioner



QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of Federal Rules of Civil Procedure 58 and 59 and Federal Rule of Appellate Proceeding 4(a)(4) apply to important proceedings and determinations occurring after judgment on the merits, such as awards of attorneys' fees.

2. Whether a post-judgment order directing the entry of an attorneys' fees judgment can constitute a "judgment" within the meaning of Federal Rule of Civil Procedure 58, where the separate attorneys' fees judgment has been entered pursuant to the order.

3. Whether motions denominated as seeking to "alter or amend" an attorneys' fees judgment, but which in fact are not directed to that judgment, trigger Federal Rule of Appellate Procedure 4(a)(4) and nullify an otherwise timely notice of appeal.

4. Whether, after the clerk enters a judgment for attorneys' fees based upon the court's post-judgment order requiring further briefing on costs and directing the entry of a separate attorneys' fees judgment, motions addressing only costs issues toll the time for appealing the attorneys' fees judgment pursuant to Federal Rule of Appellate Procedure 4(a)(4).

LIST OF PARTIES TO THE PROCEEDING

The following persons were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Fairfield Engineering Company
2. Federal Insurance Company
3. Charles T. Main, Inc.
4. City of Lakeland, Florida

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW....	i
LIST OF PARTIES.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	vi
OPINIONS IN THE COURT BELOW.....	1
JURISDICTION.....	1
FEDERAL RULES INVOLVED.....	2
STATEMENT OF THE CASE.....	5
A. Proceedings In the Trial Court.....	5
1. The March 21, 1990, Order Regarding Attorneys' Fees and Costs, and the Separate Judgment for Attorneys' Fees	6
2. The Motions Filed Following the March 21 Order and the Attorneys' Fees Judgment.....	9
3. Federal's April 20, 1990, Notice of Appeal from the Attorneys' Fees Judgment.....	11
4. The July 6, 1990, Order and the Costs Judgment.....	12

TABLE OF CONTENTS (Cont'd)

	<u>Page</u>
B. Proceedings In The Court Of Appeals.....	13
REASONS FOR GRANTING THE WRIT.....	16
A. The Court of Appeals' Ruling Incorrectly Assumed The March 21 Order Was An Appealable Judgment, Contrary To The Provisions of Federal Rule of Appellate Procedure 58.....	19
B. The Court of Appeals Incorrectly Held The Motions To Alter Or Amend, Which Did Not Challenge The Substantive Correctness Of The Attorneys' Fees Judgment, Tolloed The Time For Appeal.....	25
CONCLUSION.....	29
APPENDIX.....	App.1

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Bankers Trust Co. v. Mallis,</u> 435 U.S. 381 (1978).....	21
<u>Budinich v. Pecton Dickinson & Co.,</u> 486 U.S. 196 (1988).....	18, 25
<u>Buchanan v. Stanships, Inc.,</u> 485 U.S. 265 (1988).....	18, 26
<u>F.E.L. Publications, Ltd. v.</u> <u>Catholic Bishop of Chicago,</u> 739 F.2d 284 (7th Cir. 1984)...	24
<u>Huecker v. Milburn,</u> 538 F.2d 1241 (6th Cir. 1976)..	24
<u>Osterneck v. Ernst & Whinney,</u> 489 U.S. 169 (1989).....	19
<u>United States v. Indrelunas,</u> 411 U.S. 216 (1973).....	20
<u>United States v. Kansas City, Kansas,</u> 761 F.2d 605 (10th Cir. 1985)..	20, 21
<u>White v. New Hampshire Department</u> <u>of Employment Security,</u> 455 U.S. 445 (1982).....	18, 25 26

TABLE OF AUTHORITIES (Cont'd)PageStatutes and Rules

28 U.S.C. § 1254.....	2
Fed. R. Civ. P. 58.....	passim
Fed. R. Civ. P. 59.....	passim
Fed. R. App. P. 4(a)(4).....	passim

Other Authorities

111 C. Wright & A. Miller, <u>Federal Practice and Procedure</u> § 2785 (1973).....	21
---	----

OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dismissing petitioner's appeal from the attorneys' fees judgment, and the order denying rehearing, have not been reported, and are reproduced in the appendix hereto. (App. 67 and 73).

The order concerning attorneys' fees and costs and the final judgment for attorneys' fees entered by the United States District Court for the Middle District of Florida have not been reported, and are reproduced in the appendix hereto. (App. 1 and 32).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its decision and opinion June 19, 1991, and

entered the order denying the timely petition for rehearing on July 26, 1991.

The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Eleventh Circuit is invoked under Title 28, United States Code, Section 1254.

FEDERAL RULES INVOLVED

Rule 58 of the Federal Rules of Civil Procedure:

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recovery only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to

interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 59(e) of the Federal Rules of Civil Procedure:

Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 4(a)(4) of the Federal Rules of Appellate Procedure:

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or

not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASEA. Proceedings In The Trial Court

This case arises from a multiple claim, multiple party action in the United States District Court for the Middle District of Florida. Pursuant to the district court's "certification" under Federal Rule of Civil Procedure 54(b) on March 2, 1989, judgments were entered on certain claims involving respondent City of Lakeland ("Lakeland"), petitioner Federal Insurance Company ("Federal"), Fairfield Engineering Company ("Fairfield"), and Charles T. Main, Inc. ("Main"). Fairfield and Federal appealed to the United States Court of Appeals for the Eleventh Circuit from these judgments on the merits, which did not dispose of issues of attorneys' fees and costs. The appeal of the judgments on the

merits is pending in the court of appeals.

1. The March 21, 1990, Order Regarding Attorneys' Fees and Costs, and the Separate Judgment for Attorneys' Fees

On March 21, 1990, the district court entered an order addressing issues of attorneys' fees and costs and directing the entry of a judgment solely for attorneys' fees. App. 1 (the "March 21 Order"). The district court concluded Lakeland was entitled to recover from Federal \$109,485.10 as attorneys' fees, and directed further proceedings as to costs. App. 14, 19, 29, and 30. The March 21 Order specifically directed the entry of a judgment for attorneys' fees:

Accordingly, the Clerk is directed to enter Judgment for the City of Lakeland against Federal Insurance Company for a reasonable attorney's fee in the amount of \$109,485.10.

App. 14. The instruction was repeated later in the March 21 Order:

Lakeland's motion for attorney's fees (doc. #1292) is GRANTED and the Clerk is directed to enter Judgment for the City of Lakeland and against Federal Insurance Company for a reasonable attorney's fee in the amount of \$109,485.10.

App. 29.

In accordance with the district court's instruction in the March 21 Order, an attorney's fees judgment was entered the same day, March 21, 1990.

App. 32 (the "Attorneys' Fees Judgment"). The Attorneys' Fees Judgment stated in its entirety:

IT IS ORDERED AND ADJUDGED that Judgment is entered for the CITY OF LAKELAND and against FEDERAL INSURANCE COMPANY for a reasonable attorney's fee in the amount of \$109,485.10.

App. 33. By its terms, and on its face, the Attorneys' Fees Judgment related

only to attorneys' fees, not costs. Moreover, the Attorneys' Fees Judgment entered on March 21 in no way incorporated any of the costs rulings in the March 21 Order.

Unlike the Attorneys' Fees Judgment, the March 21 Order addressed various costs issues. It considered Fairfield's objections to Main's and Lakeland's bills of costs. The district court ruled that Main's bill of costs be sustained to the extent of \$93,004.06, App. 29, and reserved ruling on Lakeland's bill of costs pending further briefing. App. 19 and 30. As the district stated:

The Court RESERVES RULING on Lakeland's Bill of Costs and Lakeland is directed to file within ten (10) days from the date of this Order a memorandum with accompanying documentation to support the

taxing of costs associated with its expert witnesses within the limitations set forth in 28 USC § 1821. Fairfield shall have five (5) days thereafter within which to respond.

App. 30. With further proceedings ahead on Lakeland's costs claim, the district court did not direct the entry of any judgment on costs. App. 29 and 30.

2. The Motions Filed Following the March 21 Order and the Attorneys' Fees Judgment

All four parties filed motions respecting different aspects of the March 21 Order. Only one of the motions, however, was directed to the attorneys' fees ruling and the Attorneys' Fees Judgment: Lakeland's motion to reconsider pursuant to Federal Rule of Civil Procedure 52(b). That motion, however, was filed untimely, as the district court held in its Order of

July 6, 1990. App. 54-5. The district court ruled that, because the motion was untimely, the court was without jurisdiction to consider the motion. Id.^{1/}

Main's motion, designated as one to "Alter or Amend Judgment," had nothing to do with the Attorneys' Fees Judgment. App. 41-45. Main's motion addressed only the ruling in the March 21 Order concerning Main's bill of costs, and sought the inclusion of a \$1,495.56 item as a recoverable cost. Id.

^{1/} The Attorneys' Fees Judgment was entered March 21, 1990. Excluding intervening Saturdays and Sundays, Lakeland's motion was required to be served on April 4, 1990, but it was not served until April 6, 1990. Lakeland did not appeal the holding that its motion was untimely filed.

Similarly, Fairfield and Federal filed a motion, also misdesignated as one to "Alter or Amend the Judgment," and also addressing only the district court's ruling on Main's bill of costs in the March 21 Order. App. 34-40. Fairfield and Federal sought the correction of an arithmetical mistake in the district court's computation of Main's taxable costs. Id. Federal, the only party other than Lakeland directly affected by the Attorneys' Fees Judgment, did not seek to alter or amend that judgment. Id.

3. Federal's April 20, 1990,
Notice of Appeal from the
Attorneys' Fees Judgment

The Attorneys' Fees Judgment was entered against Federal on March 21, 1990. Because the only post-judgment motion addressing that judgment was untimely filed, Federal filed its notice

of appeal of that judgment timely on April 20, 1990. App. 46.

4. The July 6, 1990, Order and the Costs Judgment

In addition to ruling that Lakeland's Rule 52(b) motion was untimely, the district court's July 6, 1990, Order also disposed of the remaining costs issues. First, it granted both Main's and Fairfield's motions to amend the rulings in the March 21 Order regarding Main's bill of costs. App. 52-3. It also disposed of issues regarding Lakeland's bill of costs. App. 55-63. Finally, it directed entry of judgment for costs as follows:

1. Main's motion to alter or amend (doc. #1394) and Fairfield's motion to alter or amend (doc. # 1396) are GRANTED. The Court's March 21 Order is AMENDED to sustain the taxation of Main's Bill of Costs in the amount of \$18,835.67 rather than \$93,004.00. The Clerk is

directed to enter judgment accordingly.

. . . .

3. The taxation of costs in Lakeland's Bill of Costs is sustained to the extent of \$26,392.82, but in all other respects is withdrawn and set aside. The Clerk is directed to enter judgment accordingly.

App. 63-4.

The district court's rulings in the July 6, 1990, Order did not amend the Attorneys' Fees Judgment, nor did it instruct that an amended judgment be entered. Rather, the July 6 Order amended the March 21 Order (not the judgment), but only with regard to Main's bill of costs, and it directed the clerk to enter a costs judgment as to Main's bill of costs and as to Lakeland's bill of costs. Id.

Thereupon, the clerk entered a judgment which, though misdesignated as

an "amended" judgment, merely amended the March 21 Order regarding Main's bill of costs and entered judgment for Main's and Lakeland's costs. App. 65. The August 7, 1990 costs judgment, thus stated as follows:

IT IS ORDERED AND AD-
JUDGED The Court's order of
March 21, 1990 is AMENDED to
sustain the taxation of Main's
Bill of Costs in the amount of
\$18,835.67 rather than
\$93,004.06. The taxation of
costs in Lakeland's Bill of
Costs is sustained to the
extent of \$26,392.86, but in
all other respects is with-
drawn and set aside.

Id. (emphasis added).

B. Proceedings In The Court Of Appeals

On June 19, 1991, the United States Court of Appeals for the Eleventh Circuit entered a decision and opinion dismissing Federal's April 20, 1990, appeal from the Attorneys' Fees Judgment. App. 67. Basing its ruling

on Federal Rule of Appellate Procedure 4(a)(4), the court of appeals held that the motions "to alter or amend" pending at the time Federal filed its notice of appeal rendered the notice premature and ineffective. The court of appeals ruled as follows:

Federal Insurance Company filed appeal No. 90-3368 on April 20, 1990, from the district court's original judgment for attorney's fees and costs in the action. At that time, however, the parties' timely served motions to alter or amend the judgment were still pending in the district court. Since it is settled that a notice of appeal filed prior to the disposition of such motions is premature and ineffective, this appeal must be dismissed for lack of jurisdiction. Fed.R.App.P. 4(a)(4); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982); Campbell v. Wainwright, 726 F.2d 702, 703 (11th Cir. 1984).

App. 68-9. Thereafter, the court of appeals denied Federal's petition for

rehearing. App. 73. These are the decisions of the United States Court of Appeals for the Eleventh Circuit which petitioner asks the Court to review.

REASONS FOR GRANTING THE WRIT

There are two good reasons why the Court should grant this petition for a writ of certiorari. First, this case will allow the Court to clarify whether and how Federal Rules of Civil Procedure 58 and 59 and Federal Rule of Appellate Procedure 4(a)(4) apply to important determinations which occur in trial courts following judgments on the merits. In these days when costs and attorneys' fees incurred in litigation can approach, exceed, or even dwarf the

amounts at stake in the case,^{2/} it is important that the order, certainty, and finality afforded by Rules 58 and 59 and Rule 4(a)(4) be present in the significant proceedings, which often are "collateral" in name only, that occur following final judgment on the merits.

Second, this case will allow this Court to provide further guidance in regard to its holdings that post-judgment motions, regardless of their title, designation, or purported basis, which do not question the substantive correctness of a judgment, do not trigger the provisions of Federal

^{2/} In this case, for instance, the jury awarded Lakeland damages in the amount of \$578,187.86, and Lakeland later asked the district court to award it \$426,417.08 for attorneys' fees and \$338,172.35 for experts' fees.

Rule of Appellate Procedure 4(a)(4). See White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982) (motions under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act, are not motions to alter or amend the judgment under Federal Rule of Civil Procedure 59(e)); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 108 S.Ct. 1717 (1988), (elaboration on White: all post-judgment motions for attorneys' fees, regardless of the basis under which they are sought, do not extend the time to appeal under Federal Rule of Appellate Procedure 4(a)(4)); and Buchanan v. Stanships, Inc., 485 U.S. 265, 108 S.Ct. 1130 (1988) (post-judgment motion for costs, although brought as a motion under Rule 59(e), is not a motion to alter or amend the judgment, but rather a motion under Rule

54(a) which does not nullify a notice of appeal filed before disposition of the motion); but see Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989) (request for prejudgment interest is properly characterized as a motion to alter or amend the judgment pursuant to Rule 59).

A. The Court of Appeals' Ruling Incorrectly Assumed The March 21 Order Was An Appealable Judgment, Contrary To The Provisions Of Federal Rule Of Appellate Procedure 58

Rule 58 of the Federal Rules of Civil Procedure specifically requires that "[e]very judgment shall be set forth on a separate document." This "separate document" requirement was included in Rule 58 in order to eliminate the "considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and [the] occasional grief to litigants

as a result of this uncertainty." United States v. Indrelunas, 411 U.S. 216, 220 (1973). Rule 58 must be "mechanically applied," id. at 222, because

A conflict on an issue such as this [whether an appealable final decision has been entered], is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered.

Id. at 217-18.

Opinions, such as the March 21 Order entered in this case by the district court, generally do not have the effect of judgments. Thus, in United States v. Kansas City, Kansas, 761 F.2d 605 (10th Cir. 1985), the court ruled that a memorandum and order containing "apparently dispositive

language" regarding an attorneys' fees award, was not an appealable Rule 58 judgment. As the court stated:

[T]he district court issued a three page memorandum and order. While this memorandum contained apparently dispositive language, it also included a discussion of legal issues constituting an opinion of the district court. Thus, the memorandum did not qualify as a judgment under Rule 58 .

. . .

761 F.2d at 606. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2785 (1973). Similarly, the district court's March 21 Order, which also contained a discussion of legal issues, does not "qualify as a judgment under Rule 58."

This is not a case, like Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978), in which it could be said that the separate-judgment requirement of Rule 58 was waived, and somehow the

March 21 Order may be deemed a judgment within the meaning of Rule 58. It is clear the district court did not intend the March 21 Order to constitute a judgment because the court specifically directed the entry of a separate judgment on attorneys' fees and asked for more briefing regarding costs. Its explicit direction for the entry of a judgment for attorneys' fees, which appeared twice in the order, demonstrates the district court contemplated a separate (and proper) judgment under Rule 58. App. 14 and 29. It also is clear from the March 21 Order, which instructed that judgment be entered only for attorneys' fees and withheld any similar instruction for costs, and from the face of the Attorneys' Fees Judgment, that the judgment did not pertain to costs but only to attorneys' fees.

The court of appeals, however, deemed the March 21 Order to be an appealable Rule 58 judgment. It stated in its decision that Federal appealed "from the district court's original judgment for attorney's fees and costs in the action." App. 69. (emphasis added). The only document which treated attorneys' fees and costs was the March 21 Order. The Attorneys' Fees Judgment, also entered on March 21, dealt only with attorneys' fees.

The court of appeals proceeded to rule that Federal's notice of appeal was "premature and ineffective" because it was filed prior to disposition of "timely served motions to alter or amend the judgment. . . ." Id. The only timely served motions, however, were those of Fairfield, Federal, and Main, and they addressed only issues regarding

costs presented by the March 21 Order. App. 34 and 41. The court of appeals evidently ruled that because the motions to alter or amend as to costs addressed one portion of the March 21 Order, the time for appeal of all aspects of the March 21 Order, including attorneys' fees issues, was extended until disposition of the motions. See F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, 739 F.2d 284 (7th Cir. 1984) (time for all parties to appeal tolled even if only one party files Rule 59(e) motion directed at only one part of the judgment).

The court of appeals erred fundamentally in deeming the March 21 Order a Rule 58 judgment. Its opinion conflicts with Huecker v. Milburn, 538 F.2d 1241 (6th Cir. 1976), which requires that post-judgment attorneys' fees awards comply with Rule 58

requirements. The Court should grant certiorari in this case and require that Rule 58 be uniformly applied in post-judgment rulings.

B. The Court of Appeals Incorrectly Held The Motions To Alter Or Amend, Which Did Not Challenge The Substantive Correctness Of The Attorneys' Fees Judgment, Tolloed The Time For Appeal

The court of appeals ruled that because "timely served motions to alter or amend the judgment were still pending . . . [Federal's] notice of appeal filed prior to the disposition of such motions [was] premature and ineffective" App. 69. This ruling conflicts squarely with the principles behind the Court's rulings in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 108 S.Ct. 1717 (1988); and Buchanan v.

Stanships, Inc., 485 U.S. 265, 108 S.Ct. 1130 (1988). The rationale of these cases is that certain post-judgment motions, such as ones for attorneys' fees and costs, are collateral to the judgment on the merits, and will not trigger the tolling provisions of Federal Rule of Appellate Procedure 4(a)(4). Thus, with regard to motions to alter or amend judgments, "federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." White v. New Hampshire Department of Employment Security, 455 U.S. at 451. It is well settled that courts will assess the function of a motion, and disregard its label, in determining whether it triggers Rule 4(a)(4). Buchanan v. Stanships, Inc. (application for costs

styled as a "Motion to Alter or Amend Judgment" treated as motion under Rule 54(d), not 59(e)).

In this case, the judgment on appeal was the Attorneys' Fees Judgment, and it dealt only with attorneys' fees, and not with costs. The court of appeals ruled, however, that two motions denominated as "motions to alter or amend the judgment" triggered Rule 4(a)(4) even though they did not pertain to attorneys' fees. The motions concerned only costs, and there was nothing about them which challenged the substantive correctness of the Attorneys' Fees Judgment.

The court of appeals ruling was incorrect, and the Court should grant certiorari and clarify that Rule 59 of the Federal Rules of Civil Procedure and Rule 4(a)(4) of the Federal Rules of

Appellate Procedure apply with equal force to post-merits judgment determinations such as attorneys' fees awards. The Court also should amplify the principles which underpin its rulings concerning the interplay of Rule 59 and Rule 4(a)(4) to clarify that post-judgment motions, regardless of their labels, will not trigger Rule 4(a)(4) unless they challenge the substantive correctness of the judgment.

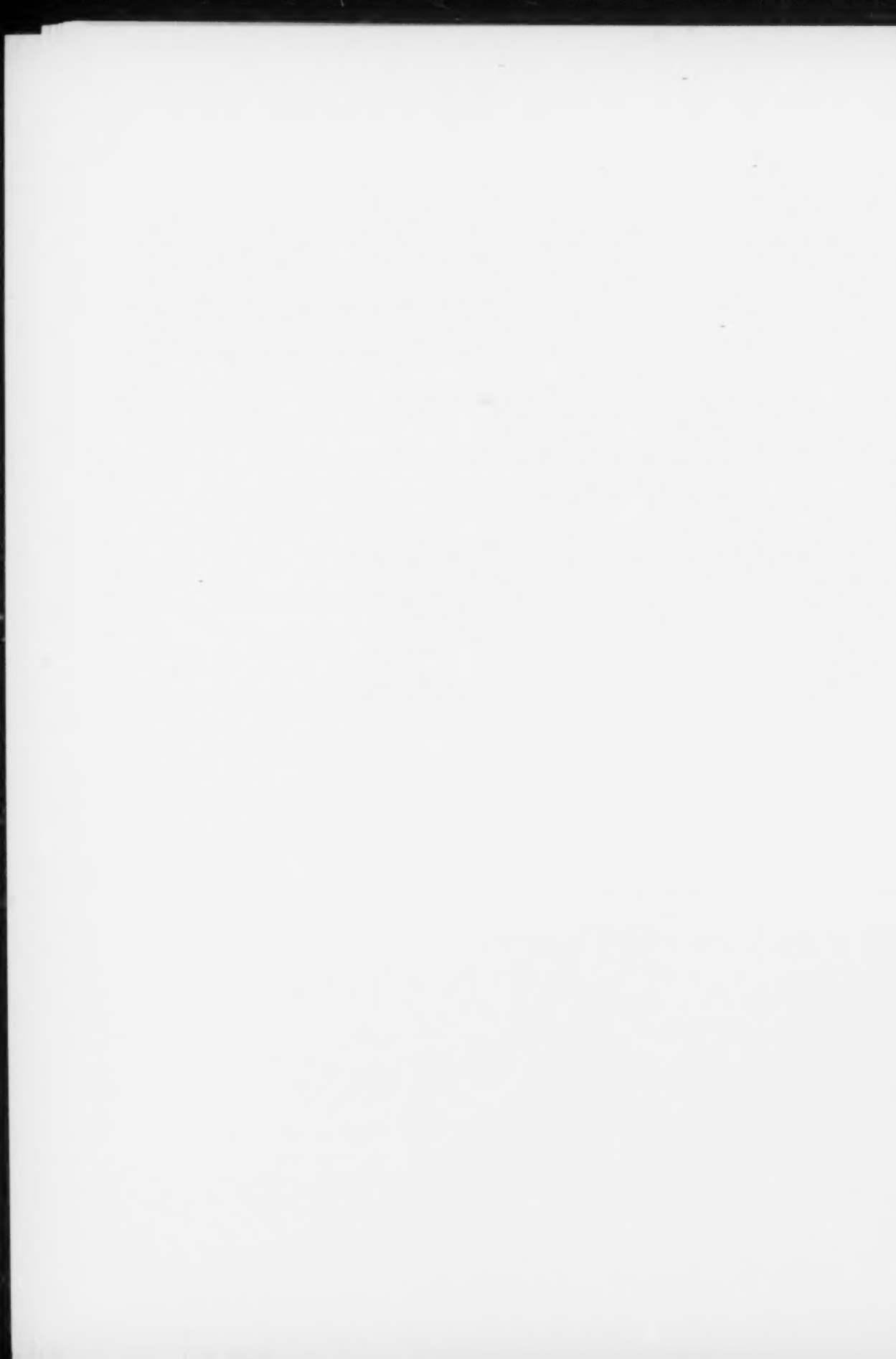
CONCLUSION

For all of the foregoing reasons,
this Petition for Writ of Certiorari to
the United States Court of Appeals for
the Eleventh Circuit should be granted.

Respectfully submitted,

Richard J. Ovelmen
(Counsel of Record)
Landon K. Clayman
Baker & McKenzie
Suite 1600
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 789-8900

Attorneys for Petitioner



APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

Table of Contents

- App. 1 Order Regarding Attorneys' Fees
 and Costs entered by the United
 States District Court for the
 Middle District of Florida
 ("USDC") on March 21, 1990
- App. 32 Attorneys' Fees Judgment
 entered by USDC on March 21,
 1990
- App. 34 Fairfield Engineering Company's
 and The Federal Insurance
 Company's Joint Motion to Alter
 or Amend the Judgment and
 Memorandum of Law in Support
 filed with USDC on April 4, 1990
- App. 41 Chas T. Main's Motion to Alter
 or Amend Judgment and
 Memorandum of Law in Support
 filed with USDC on March 30,
 1990
- App. 46 Federal Insurance Company's
 Notice of Appeal filed with
 USDC on April 20, 1990

- App. 49 Order on Costs entered by USDC
on July 6, 1990
- App. 65 Final Judgment for Costs
entered by USDC on August 7,
1990
- App. 67 Decision and Opinion of United
States Court of Appeals for the
Eleventh Circuit ("USCA")
Dismissing Federal's April 20,
1990, Appeal from the
Attorneys' Fees Judgment
entered June 19, 1991
- App. 73 Order of USCA denying Federal's
Petition for Rehearing of June
19, 1991, Decision and Opinion
entered July 26, 1991

App. 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-1394 Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKE LAND,

Defendant/Counterclaimant,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, etc. et al.,

Counterclaim Defendants.

CHAS T. MAIN, INC.,

Counterclaim Defendant/
Third-Party Plaintiff,

v.

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

App. 2

O R D E R

A jury trial was conducted concerning the coal handling system in this case from February 6, 1989 through March 2, 1989. Pursuant to a jury verdict, judgment was entered for the City of Lakeland ("Lakeland") against Fairfield Engineering Company and Federal Insurance Company (collectively "Fairfield"), and for Chas. T. Main, Inc. ("Main") against Fairfield. The Clerk has taxed costs in favor of Lakeland and Main. Before the Court are Lakeland's motion for an award of attorney's fees against Federal Insurance Company ("Federal"), Main's motion for an award of attorney's fees against Fairfield, and Fairfield's motions pursuant to F.R.Civ.P. 54(d) to review the costs taxed by the Clerk in favor of Lakeland and Main.

App. 3

I. Lakeland's Motion for Attorney's Fees

Lakeland has requested that the Court tax against Federal, pursuant to section 627.756, Florida Statutes, the reasonable attorney's fees incurred by Lakeland in connection with the trial of the coal handling claim. Section 627.428, Florida Statutes (1987), permits the recovery of attorney's fees when an insured recovers a judgment against an insurer. Section 627.756, Florida Statutes (1987) provides that:

Section 627.428 applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers, and materialmen shall be

App. 4

deemed to be insureds or
beneficiaries for the
purposes of this section.

Federal has opposed Lakeland's motion
for attorney's fees on a number of
grounds.^{1/}

Federal first contends that because
Fairfield's contract with Lakeland was
simply to supply prefabricated equipment
to the job site, and did not entail any
installation, erection or construction,
the contract was not a "building or
construction contract" within the

^{1/} Federal has renewed its argument
that Lakeland's motion for an
extension of time to file its motion
for attorney's fees was untimely
based on Local Rule 4.18,
M.D.Fla.Rules. The motion for fees
is deemed timely pursuant to the
Orders entered on May 24 and June 6,
1989, extending the time for
Lakeland to file its motion for
attorney's fees.

App. 5

meaning of the statute. Federal thus contends that because section 627.756 only applies to "building or construction contracts," Lakeland may not rely on it as a basis for an award of fees.

It appears that no Florida court has explicitly addressed the question whether a contract to supply materials to a construction site for a construction project may be considered a building or construction contract within the meaning of the statute. However, because the statute specifically states that section 627.428 applies to suits brought by materialmen, the term, "building or construction contract" must

App. 6

include a contract to supply materials at a job site.^{2/}

Federal next contends that the Court should deny Lakeland's motion for attorney's fees because Lakeland's claim against Fairfield involved factual and legal issues which Federal could not reasonably be expected to resolve on its own. Despite the mandatory language of section 627.428, Florida courts have held that an award of fees is inappropriate unless "the [insurance] company wrongfully caused the parties to resort to litigation by not resolving the

^{2/} Although the Court could locate no cases in which a prevailing party sought an award of fees against the surety of a supplier of materials, courts have granted attorney's fee awards to suppliers of materials. See, e.g., United States f/u/b/o Vulcan Materials v. Volpe Constr., 622 F.2d 880, 886-87 (5th Cir. 1980).

App. 7

conflict when it was reasonably within the company's power to do so." Crotts v. Bankers & Shippers Ins. Co., 476 So.2d 1357, 1358 (Fla. 2nd DCA 1985) (emphasis added). Federal contends that it stood in the same position as the insurance carrier in Crotts, supra, where the court held that the prevailing party was not entitled to attorney's fees under section 627.428. Unlike the present case, however, Crotts involved an interpleader action by the insurance carrier in response to the assertion of competing claims to the proceeds of the policy by the beneficiary and an assignee of the beneficiary. Simply because Lakeland claimed that both Main and Fairfield were partially at fault, and Fairfield claimed that it was not at fault, does not absolve Federal of

App. 8

liability for attorney's fees under section 627.756.

Lakeland seeks an award of attorney's fees in the amount of \$426,417.08.^{3/} In support of its motion for attorney's fees, Lakeland has submitted an affidavit of Michael B. Colgan and a summary of the services rendered by Holland & Knight attorneys, paralegals, and staff. The summary describes the services rendered, identifies the amount of time spent in

^{3/} This request is based on the services rendered by Holland & Knight through April 30, 1989 and the services rendered by Mark Miller as Lakeland City Attorney through March 2, 1989. Lakeland also requested that the Court tax its expert witness fees as a part of the attorney's fee award. However, the Court's conclusion that the attorney's fee award is limited to 12.5 percent of the judgment makes it unnecessary to address this issue.

App. 9

connection therewith, and states the standard hourly rate for the individual rendering the service. Lakeland has also submitted an affidavit of Mark N. Miller which states that he devoted 247 hours to the litigation of the coal handling portion of this case, and describes the services he rendered. The Miller affidavit also opines that an hourly rate of \$125.00 would be fair and reasonable.

Federal contends that the time records submitted by Holland & Knight are not reliable and should not be used as a basis for calculating an attorney's fee award. Federal observes that Lakeland pursued coal handling claims against Main as well as Fairfield, and that for a substantial portion of this case Lakeland also pursued its limestone handling claims against Main and

App. 10

Fairfield, which involved many of the same witnesses as the coal handling claims. Fairfield thus contends that Lakeland's submissions fail to sufficiently separate fees incurred in litigating the coal handling claim against Fairfield from fees resulting from the other claims. The Court accepts the affidavit of Michael Colgan which states that the summary of hours represents time spent litigating the coal handling portion of the case and that any time not reasonably related to the litigation of this claim against Fairfield or Federal was "deducted in its entirety or apportioned and ratably reduced."

Considering the novelty and difficulty of the questions involved, and based on the summaries of services submitted in support of the motion, the

App. 11

Court concludes that the total number of hours claimed by Holland & Knight and Mark Miller is reasonable. Secondly, based on the skill required to perform the legal services properly, the customary fee for services of a similar nature, the experience, reputation and ability of the attorneys, and the nature and length of the relationship with the client, the Court finds that the hourly rates set forth in Exhibit 2 to the Colgan affidavit and the \$125.00 hourly rate claimed by Mark Miller are reasonable.

However, Federal contends that any fee award to which Lakeland is entitled must be limited to twelve and one half percent of the judgment recovered. Prior to October 1, 1982, section 627.756 limited the attorney's fee award to "not ... more than 12.5 percent of

App. 12

the amount which the judgment or decree awards such plaintiff under the bond (exclusive of the costs of suit and attorney fees or compensation)"

In L. Ross v. R. W. Roberts Constr. Co. 481 So.2d 484 (Fla. 1986), the Florida Supreme Court approved the decision of the Fifth District Court of Appeal which held that the twelve and one half percent limitation on fee awards applies to causes of action which accrued prior to October 1, 1982. Thus, if Lakeland's cause of action against Fairfield accrued prior to October 1, 1982, Lakeland's attorney's fee award is limited to twelve and one half percent of the judgment recovered.

As a general rule under Florida law, a cause of action accrues "when there has been notice of an invasion of legal rights or a person has been put

App. 13

on notice of his right to a cause of action." Kelley v. School Board of Seminole County, 435 So.2d 804, 806 (Fla. 1983). Federal has pointed to evidence in the record which establishes that Lakeland had knowledge of the defects in the coal handling system sufficient to put it on notice of its right to a cause of action prior to October 1, 1982.^{4/} Thus, Lakeland, is entitled to an award of fees in the amount of \$109,485.10, representing

^{4/} Lakeland has not rebutted, by motion for leave to reply or otherwise, Federal's showing that the cause of action occurred prior to October 1, 1982. The Court thus finds, for the purposes of Lakeland's motion for attorney's fees, that its coal handling claim against Fairfield accrued prior to October 1, 1982.

App. 14

twelve and one half percent of
\$875,880.86.^{5/}

Accordingly, the Clerk is directed to enter Judgment for the City of Lakeland and against Federal Insurance Company for a reasonable attorney's fee in the amount of \$109,485.10.

II. Main's Motion for Attorney's Fees

Main has filed a motion for sanctions and attorney's fees pursuant to Rule 11, F.R.Civ.P., and the inherent authority of the Court, against Fairfield Engineering Company, Inc. ("Fairfield").^{6/} Main contends that

^{5/} Lakeland recovered \$578,187.86 in the Judgment entered on March 2, 1989 and \$297,693.00 in the Judgment entered on June 29, 1989.

^{6/} With respect to the discussion of Main's motion for fees, "Fairfield" refers to Fairfield Engineering Company only, and does not include (Footnote continued on next page.)

App. 15

the third-party claims asserted against it by Fairfield were not well grounded in fact and that this would have been apparent to counsel for Fairfield had they conducted a reasonable prefiling inquiry.

Rule 11 requires that a party or attorney conduct a reasonable, prefiling inquiry into the facts and law of a case before signing a pleading. Donald v. Clerk, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc). The standard to be applied is one of reasonableness under the circumstances at the time the pleading was signed, a standard more stringent than the original good-faith formula of former Rule 11. Id.

(Footnote continued from previous page.)
Federal Insurance Company.

App. 16

Main contends that Fairfield's "entire case" against it was based on the allegation that Main was responsible for determining the dimensions of the rotary plow cap and that Main's selection of the wrong dimensions caused Fairfield's equipment to perform below capacity. As evidence that Fairfield's crossclaims against Main were not well grounded in fact and that Fairfield failed to conduct a reasonable, prefiling inquiry into the facts of the case, Main points to evidence in the record that contradicts Fairfield's allegations. Main also contends that no evidence was offered at trial in support of Fairfield's allegations.

Although the evidence in opposition to Fairfield's interpretation of its contract with the City of Lakeland was substantial, Fairfield submitted evidence at trial in support of its

App. 17

allegations that Main was responsible for determining the dimensions of the rotary plow cap. The Court concludes that Fairfield's evidentiary showing at trial was not so insubstantial as to demonstrate that Fairfield filed its crossclaims against Main without a reasonable prefiling inquiry into the factual basis for its claims. As Main points to no other basis for finding that Fairfield violated Rule 11,^{7/} Main is not entitled to an award of attorney's fees on this ground.

Main also requested an award of fees based on the Court's inherent power

^{7/} As Main identifies no other ground for imposing sanctions, Main's motion for oral argument (doc. #1331) is DENIED.

App. 18

to make such an award under the "bad-faith exception" to the American Rule. Based on the foregoing discussion with respect to Rule 11, Main is also not entitled to an award of fees based on this ground. Accordingly, Main's motion for sanctions is due to be denied.

III. Lakeland's Bill of Costs

The Clerk has taxed costs in the total amount of \$391,646.28 in favor of Lakeland (Doc. #1293). Lakeland seeks taxation of \$338,172.35 for expert witness fees under 28 USC §1920(3). Lakeland is not entitled to fees for its expert witnesses under section 1920(3) in excess of the limitations established by 28 USC §1821. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). Lakeland also sought to recover its expert witness fees as a component

App. 19

of its attorney's fee award, and requested that it be allowed to file an amended bill of costs in the event the Court denied recovery for its expert fees on these bases. As Lakeland may recover costs associated with its expert witnesses within the limitations established in 28 USC §1821, the Court RESERVES RULING on Fairfield's motion for review of Lakeland's bill of costs. Lakeland is directed to file within ten (10) days of the date of this Order a memorandum with accompanying documentation to support the taxing of costs associated with its expert witnesses within the limitations established in 28 USC §1821. Fairfield shall have five (5) days thereafter within which to respond.

App. 20

IV. Main's Bill of Costs

Recoverable costs are described in

28 USC §1920 as follows:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees expenses, and costs of special interpretation services under section 1828 of this title.

Absent an explicit statutory or contractual authorization for the taxation of litigation expense, federal courts are bound by the limitations set forth in

App. 21

section 1920 of title 28. Crawford Fitting Co. v. J. T. Gibbons, Inc., 107 S.Ct. 2494, 2499 (1987).

The Clerk has taxed costs in the total amount of \$288,336.59 for Main (doc. #1295). Fairfield has objected to several items of costs submitted by Main and contends that costs should be re-taxed in an amount not to exceed \$2,669.25. Main seeks \$19,062.38 for deposition transcripts. Fairfield contends that many of these depositions involved the claims between Lakeland and Main, rather than the claims between Main and Fairfield. Fairfield thus contends that Main is seeking to tax these costs against it contrary to the Court's Order entered February 8, 1989, which required that Main and Lakeland bear their own costs with respect to the claims they settled. Fairfield also

App. 22

contends that Main is seeking to tax costs associated with its claims against Fairfield on which Fairfield prevailed prior to trial.

Main responds^{8/} that Fairfield's crossclaims sounding in contribution, indemnity and negligence mirrored the claims asserted against it by Lakeland, such that the costs incurred with respect to the coal handling litigation were attributable equally to Fairfield and Lakeland. Thus, Main contends that it would be impossible or impracticable to apportion the costs incurred by Main

^{8/} Main's motion for leave to file a response (doc. #1349) is GRANTED and the Clerk is directed to file the response attached to the motion. Fairfield's motion for leave to file a reply (doc. #1364) is GRANTED and the Clerk is directed to file the reply attached to the motion.

App. 23

between its defense of Lakeland's claims and its defense of Fairfield's claims. Although Main's defense of Lakeland's claims was not identical to its defense of Fairfield's claims, the Court concludes that the issues raised were sufficiently similar and overlapping that apportionment would be impracticable.

The Court finds that the depositions for which Main seeks reimbursement were reasonably necessary for use in the case at the time they were taken. However, \$2857.36 represents costs for copies, express mailing, computer disk copies, and duplication of video tapes which were incurred for the convenience of counsel and are therefore not recoverable. Moreover, Main is not entitled to \$1495.56 representing costs incurred for

App. 24

depositions for which no documentation was included in exhibit # 1 to its bill of costs.^{9/}

Main seeks to tax \$2916.36 for trial transcripts. The Court concludes that the transcript of the summary bench trial and the hourly, daily or expedited transcriptions of the jury trial were for the convenience of counsel and not necessary for use in the case. The Court will allow \$689.25 representing the cost of 919 pages of transcripts at a reasonable rate of \$.75 per page. Main also seeks reimbursement of \$15,115.35 for computer services

^{9/} The depositions without documentation are those of P. Gorman, J. Sayler, E. Coulter, J. Alger, W. White, E. McCreery, M. McFann, D. VanSickle, E. Smeltzer, and R. Tucker.

App. 25

utilized to computer portions of deposition testimony. As these costs were incurred for the convenience of counsel, they are not recoverable.

Fairfield objects to \$389.00 in service of process fees for independent process servers. Fairfield contends that the costs of a private process server is not a "[f]ee of the ... marshal," and is therefore not recoverable under section 1920(1). Since the enactment of section 1920, the method for serving civil summonses and subpoenas has changed in that the use of private process servers has generally been substituted for the U.S. Marshal Service. See Roberts v. Homelite Div. of Textron, Inc., 117 F.R.D. 637, 641 (N.D. Ind. 1987) (allowing recovery of costs for private process servers under 1920(1)). Although this change suggests

App. 26

that costs for private process servers should be recoverable, the Court is bound by the language of section 1920(1). Accordingly, Main's costs for private process servers are not recoverable. Accord Viacao Aerea Sao Paulo v. Int'l Lease Finance Corp., 119 F.R.D. 435 (C.D. Cal. 1988).

Fairfield objects to reimbursement of \$2,652.96 for the expenses incurred by Main employees W. Wilcoxson and R. A. Cochran in attending depositions of other witnesses. The Court concludes that these costs were incurred for the convenience of counsel. The charges by Stone and Webster in the amount of \$13,695.97 for the consultation services of J. R. Becker and J. Newell (former employees of Main) also were incurred for the convenience of counsel. Main also seeks reimbursement in the amount

App. 27

of \$13,834.17 for expenses incurred during the trial for airfare, travel, food and overnight accommodations by Main employees Wilcoxson, Cochran, and Becker. The attendance of these persons as representatives of the corporation was for the convenience of counsel.

Main also seeks to tax \$21,562.73 incurred by counsel and representatives of Main for travel, lodging and subsistence expenses relating to the attendance of depositions. These expenses are not recoverable under section 1920. The costs incurred by Main's counsel, employees and experts in traveling to other Fairfield rotary plow installations for investigative purposes (\$4787.10) also are not recoverable under section 1920. Main's expert fees in the amount of \$66,279.47 also are not recoverable.

App. 28

Fairfield has objected to Main's request for \$28,527.03 representing subsistence and lodging expenses of counsel for Main during the trial. As Main has not identified any provision of 28 USC §1920 to support the taxing of these costs, the Court declines to tax these expenses. Main also seeks \$70,849.45 for long distance telephone charges, postage costs and duplicating expenses. These expenses represent overhead and are not recoverable.

Fairfield objects to \$16,824.62 in "miscellaneous" expenses for models, photo reproductions, copies of depositions and blueprints, and legal fees (section 10 of Main's bill of costs). The Court concludes that these expenses were not reasonably necessary for use in the case and are not allowed.

App. 29

The costs taxed by the Clerk in favor of Main and against Fairfield in the amount of \$288,336.59 must, therefore, be reduced by \$195,332.53. Thus, Main is entitled to \$93,004.06 in costs against Fairfield relating to the trial of the coal handling claim.

Upon due consideration, therefore,
IT IS ORDERED:

1. Lakeland's motion for attorney's fees (doc. #1292) is GRANTED and the Clerk is directed to enter Judgment for the City of Lakeland and against Federal Insurance Company for a reasonable attorney's fee in the amount of \$109,485.10.

2. Main's motion for attorney's fees (doc. #1298) is DENIED.

3. Main's motion for oral argument (doc. #1331) is DENIED.

App. 30

4. The Court RESERVES RULING on Lakeland's Bill of Costs and Lakeland is directed to file within ten (10) days from the date of this Order a memorandum with accompanying documentation to support the taxing of costs associated with its expert witnesses within the limitations set forth in 28 USC § 1821. Fairfield shall have five (5) days thereafter within which to respond.

5. Main's motion for leave to file a response (doc. #1349) is GRANTED and the Clerk is directed to file the response attached to the motion.

6. Fairfield's motion for leave to file a reply (doc. #1364) is GRANTED and the Clerk is directed to file the reply attached to the motion.

7. The taxation of costs in Main's Bill of Costs is sustained to the extent

App. 31

of \$93,004.06, but in all other respects
is withdrawn and set aside.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida,
this 21st day of March, 1990.

Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

App. 32

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No. 83-1394-Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

v.

CITY OF LAKE LAND

JUDGMENT IN A CIVIL CASE

—
☐ Jury Verdict. This action came
before the Court for a trial by
jury. The issues have been tried
and the jury has rendered its
verdict.

—
☒ Decision by Court. This action
came to trial or hearing before the
Court. The issues have been tried

App. 33

Oor heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered for the CITY OF LAKELAND and against FEDERAL INSURANCE COMPANY for a reasonable attorney's fee in the amount of \$109,485.10.

Date: March 21, 1990

David L. Edwards
Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-1394-Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKE LAND,

Defendant/
Counterclaimant,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, ST. PAUL
FIRE AND MARINE INSURANCE
COMPANY, FAIRFIELD ENGINEERING
COMPANY, FEDERAL INSURANCE
COMPANY, CHAS. T. MAIN, INC.,
BLOUNT INTERNATIONAL, LTD.,
UNITED STATES FIDELITY AND
GUARANTY COMPANY, AETNA
CASUALTY AND SURETY COMPANY,
FIREMAN'S FUND INSURANCE
COMPANY, A. O. SMITH-INLAND
INC., AND ARMCO, INC.,

Counterclaim
Defendants.

FAIRFIELD ENGINEERING COMPANY'S
AND THE FEDERAL INSURANCE COMPANY'S
JOINT MOTION TO ALTER OR AMEND
THE JUDGMENT AND MEMORANDUM OF LAW
IN SUPPORT

Come now Fairfield Engineering Company, Inc. and The Federal Insurance Company (collectively "Fairfield"), Counterclaim Defendants, and move this Court to alter or amend the Judgment and Order entered March 21, 1990, and state:

(1) In its Bill of Costs the Clerk taxed in favor of Main \$288,336.59.

(2) On March 21, 1990 this Court entered an Order taxing costs in favor of Chas. T. Main, Inc. and against Fairfield in the amount of \$93,004.06.

(3) From the total costs sought by Main (\$288,336.59) the Court deducted \$195,332.53, leaving a balance of \$93,004.006.

App. 36

(4) The total of the individual costs disallowed by the Court in its Opinion, however, were \$270,087.88 and not \$195,332.53. Accordingly, the correct amount of taxable costs should be \$18,238.71 and not \$93,004.06.

(5) The Court's Order should be amended to correct this mathematical mistake and to reduce the award of costs to Main to the sum of \$18,238.71.

Respectfully submitted,

John L. Ashworth
ASHWORTH & MCKINNISS
255 Executive Drive
Marion, Ohio 43302
Telephone: 614/387-0692

MEMORANDUM IN SUPPORT

Following the coal handling trial Chas. T. Main submitted, and the Clerk taxed against Fairfield, a Bill of Costs

App. 37

seeking the recovery of \$288,336.59. Fairfield objected to all but \$2,669.25. In its Judgment dated March 21, 1990 the Court addressed Main's itemized bill and disallowed a total of \$270,097.88, leaving a net taxable amount of \$18,238.71. The Court, however, through a mathematical miscalculation, concluded that Main's Bill of Costs was to be reduced by \$195,332.53. As a result the Court awarded Main costs in the amount of \$93,004.06. In light of the Court's rulings, the Order is apparently the result of a mathematical error. The proper amount taxable against Fairfield should have been \$18,238.71. Attached hereto and made a part hereof is Exhibit A which itemizes Main's Bill of Costs by

App. 38

category and shows the amounts allowed/disallowed by the Court in its March 21, 1990 Judgment and Order.

Main sought deposition transcript fees of \$19,062.38. The Court allowed \$14,709.46 and disallowed \$2,857.36 for copies, etc. as well as \$1,495.56 for undocumented claims. Main sought to tax \$2,916.36 for trial transcripts. The Court allowed \$689.25. Main's request for reimbursement of \$15,115.35 in computer service charges was rejected in toto by the Court. For witness and process fees Main sought \$3,229.00. The Court allowed \$2,840.00 and disallowed \$389.00.

Main's attempt to collect attendance expenses of Wilcoxson and Cochran (\$2,652.96), consultation service charges by Stone and Webster (\$13,695.97) and trial expenses of Main employees (\$13,834.17) were summarily

App. 39

rejected by the Court as being "for the convenience of counsel." Additionally, the Court determined that the following amounts were not recoverable under 28 USC § 1920: \$21,562.73 in costs incurred by counsel for Main for travel, lodging and subsistence expenses relating to the attendance of depositions; \$4,787.10 in travel expenses to investigate other Fairfield rotary plow installations; expert fees of \$66,279.47; \$28,527.03 in subsistence and lodging expenses of counsel during trial; overhead expenses totalling \$79,849.45; and \$16,824.62 in miscellaneous expenses.

Thus, Fairfield believes the Court incorrectly added some costs that were disallowed in reaching the amount of costs taxable in favor of Main. For these reasons Fairfield requests that

App. 40

its Motion to Alter or Amend the
Judgment be granted.

John L. Ashworth
ASHWORTH & McKINNISS
255 Executive Drive
Marion, Ohio 43302
Telephone: 614/387-0692
Attorneys for The Fairfield
Engineering Company and The
Federal Insurance Company

App. 41

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKELAND,

Defendant/Counterclaimant,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, etc., et al.,

Counterclaim Defendants.

CHAS. T. MAIN, INC.

Counterclaim Defendant/
Third-Party Plaintiff,

v.

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

CHAS. T. MAIN, INC.'S MOTION TO ALTER
OR AMEND JUDGMENT AND MEMORANDUM OF LAW
IN SUPPORT

Counterclaim Defendant, CHAS. T. MAIN, INC., by counsel, pursuant to Rule 59(e), Federal Rules of Civil Procedure, moves the Court to amend its Judgment and Order entered March 21, 1990, and states:

1. On March 21, 1990, this Court entered an Order taxing costs in favor of CHAS. T. MAIN, INC. [hereinafter "MAIN"], and against Fairfield Engineering Company and Federal Insurance Company [collectively "FAIRFIELD"] in the amount of \$93,004.06 [Ninety-Three Thousand Four Dollars and 06/100], but denied taxation of \$1,495.56 [One Thousand Four Hundred Ninety-Five Dollars and 56/100] for depositions itemized, but for which no bills were attached in the bill of costs. [Order, docket no. 1392, page 11].

App. 43

2. This Court's Order should be altered or amended to include the taxation of the \$1,495.56 as taxable costs in favor of MAIN and against FAIRFIELD because MAIN has complied with all the requirements of 28 U.S.C. Sections 1920 and 1924 for the taxation of those costs.

MEMORANDUM OF LAW

3. 28 U.S.C. Section 1920 requires that a bill of costs be filed in a case where the costs are sought to be taxed. A bill of costs is defined as "a certified, itemized statement of the amount of costs in an action or suit." Black's Law Dictionary, 5th Edition, (1979). MAIN's submitted a bill of costs which itemized the costs incurred by MAIN for depositions and which separately listed the charges for the

App. 44

ten depositions at issue in this motion.

4. MAIN also complied with 28 U.S.C. Section 1924 by the affirmation/affidavit made by Denise G. Morris, Esquire, in support of the bill of costs and contained within the bill of costs form used.

5. Through administrative oversight, the documentation (copies of bills) for the depositions was inadvertently omitted from the attachment to the bill of costs. Those missing copies are attached to this Motion as Exhibit "A".

6. Where a party has complied with the requirements of Sections 1920 and 1924 of Title 28, it is improper to fail to tax costs in favor of the Plaintiff as a prevailing party. Women's Federal Savings and Loan Association of Cleveland v. Nevada National Bank, 108

App. 45

F.R.D. 396 (D. Nevada 1985).

WHEREFORE, CHAS. T. MAIN, INC., respectfully requests this Court enter an Order amending its Order of March 21, 1990, and increasing the costs taxable in favor of CHAS. T. MAIN, INC., to \$94,499.62 [Ninety-Four Thousand Four Hundred Ninety-Nine Dollars and 62/100].

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 29th day of March, 1990, to all counsel of record as they appear on the attached service list.

DENISE G. MORRIS, ESQUIRE
Florida Bar No. 348562
FISHER, RUSHMER, WERREN RATH,
KEINER, WACK & DICKSON, P.A.
20 North Orange Avenue
Suite 1500
Post Office Box 712
Orlando, Florida 32802
(407) 843-2111

Attorneys for CHAS. T. MAIN,
INC.

App. 46

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION
OF ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKE LAND,

Defendant/Counterclaim,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, et al.,

Counterclaim
Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Federal Insurance Company ("Federal"), counter-claim defendant and cross-claimant, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from:

App. 47

1. The Judgement for attorney's fees of \$109,485.10 in a Civil Case in favor of plaintiff City of Lakeland and against Federal Insurance Company entered on March 21, 1990.

Respectfully submitted,

John L. Ashworth
Ted M. McKinniss
ASHWORTH & MCKINNISS
255 Executive Drive
Marion, Ohio 43302
Telephone: (614) 387-0692
Attorneys for Federal
Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. mail this 20th day of April, 1990, upon all persons named in the attached Service List.

App. 48

D. James Kadyk, ESQUIRE
MACFARLANE, FERGUSON,
ALLISON & KELLY
P.O. Box 1531
Tampa, Florida 33601
(813) 223-2411
Attorneys for The Federal
Insurance Company

App. 49

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-1394 Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

v.

CITY OF LAKE LAND,

Defendant/Counterclaimant,

v.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, etc., et al.,

Counterclaim Defendants.

CHAS T. MAIN, INC.,

Counterclaim Defendant/
Third-Party Plaintiff,

v.

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

O R D E R

A jury trial was conducted in the coal handling system portion of this case from February 6, 1989 through March 2, 1989. Pursuant to a jury verdict, judgment was entered for the City of Lakeland ("Lakeland") against Fairfield Engineering Company and Federal Insurance Company (collectively "Fairfield"), and for Chas. T. Main, Inc. ("Main") against Fairfield. By an Order entered on March 21, 1990, the Court granted Lakeland's motion for an award of attorney's fees denied Main's motion for an award of fees, taxed costs in favor of Main and reserved ruling on Lakeland's bill of costs. Before the Court are pending motions by the parties.

App. 51

I. Main's Motion to Alter or Amend

Counterclaim Defendant Main moves pursuant to Rule 59(e), F.R.Civ.P., to alter or amend that portion of the Court's March 21 Order that denied taxation of \$1,495.56 for deposition costs. These costs were denied because they were not supported by documentation. As Main has attached the missing documentation to its motion, the Court will reconsider the taxability of these items of costs.

The Court concludes that these depositions were reasonably necessary for use in the case. However, Main again seeks to recover costs for copies, express mailing and computer disk copies. These charges are for the convenience of counsel and are therefore not recoverable. Also, three of the invoices which include non-taxable items are not

App. 52

itemized so that the Court is unable to determine which of the expenses on these invoices are properly taxable. Accordingly, Main is entitled to \$596.96 with respect to these depositions.

Upon due consideration, therefore, Main's motion to alter or amend the judgment (doc. #1394) is due to be granted.

II. Fairfield's Motion to Alter or Amend

Fairfield moves to alter or amend that portion of the March 21 Order that awards Main costs in the amount of \$93,004.06. This figure resulted from a mathematical miscalculation. Review of the Court's March 21 Order shows that \$270,097.88, rather than \$195,332.53, should have been deducted from the amount of costs sought to be taxed by Main (\$288,336.59). Thus, Main is entitled to costs in the amount of \$18,835.67 (including the \$596.96

App. 53

associated with the additional depositions) rather than \$93,004.06. Accordingly, Fairfield's motion to alter or amend the March 21 Order (doc. #1396) is due to be granted.

III. Lakeland's Motion to Reconsider

Lakeland has filed a motion for reconsideration of the Court's March 21 Order pursuant to Rule 52(b), F.R.Civ.P. In that Order the Court concluded that, for purposes of Lakeland's motion for attorney's fees, Lakeland's cause of action against Fairfield accrued prior to October 1, 1982. The Court thus limited Lakeland's award of attorney's fees to twelve and one half percent of the judgment recovered as required by Section 627.756, Florida Statutes, as in effect prior to October 1, 1982. Lakeland contends that record evidence demonstrates that its

App. 54

cause of action did not accrue until October 14, 1982, so that the twelve and one-half percent cap should not apply. Lakeland thus requests the Court to make amended factual findings on this issue and to amend the Judgment accordingly.

A motion to reconsider, whether made pursuant to Rule 52(b) or Rule 59(e), must be made "not later than ten days after entry of the judgment." This ten day time period is jurisdictional, see Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980), and cannot be extended by the Court. See Rule 6(b), F.R.Civ.P. Judgment was entered on March 21, 1990. Excluding intervening Saturdays and Sundays, Lakeland's motion

App. 55

was required to be made by April 4, 1990.^{1/}

Lakeland's motion for reconsideration was served and filed on April 6, 1990, the Court is without jurisdiction to consider it.

IV. Lakeland's Bill of Costs

Fairfield has moved pursuant to F.R.Civ.P. 54(d) to review the costs taxed by the Clerk in favor of Lakeland. The Court's March 21 Order reserved ruling on Lakeland's bill of costs to allow Lakeland to seek taxation of costs associated with its expert

^{1/} The ten day time periods in Rule 52(b) and 59(e) commence from the entry of judgment. Thus, the additional three days allowed in F.R.Civ.P. 6(e), where a party is required to take some action within a prescribed period following service of a document and service is made by mail, does not apply.

App. 56

witnesses within the limitations set forth in 28 USC § 1821. Lakeland's bill of costs is now ripe for decision.

Recoverable costs are described in 28 USC § 1920 as follows:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Absent an explicit statutory or contractual authorization for the taxation of litigation expense, federal courts are bound by the limitations set forth in section 1920 of title 28. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482

App. 57

U.S. 437 (1987). The Clerk has taxed costs in the total amount of \$391,646.28 in favor of Lakeland (Doc. #1293). Fairfield has objected to several items of costs submitted by Lakeland and contends that costs should be re-taxed in an amount not to exceed \$6,559.77. Lakeland seeks \$981.40 for summons and subpoena fees under 28 USC § 1920(1). Fairfield contends that the costs of a private process server is not a "[f]ee of the ... marshal," and is therefore not recoverable under this section. Thus, Fairfield objects to \$945.90 of this amount. Since the enactment of section 1920, the method for serving civil summonses and subpoenas has changed in that the use of private process servers has generally been substituted for the U.S. Marshal Service. See Roberts v. Homelite Div.

App. 58

of Textron, Inc., 117 F.R.D. 637, 641 (N.D. Ind. 1987) (allowing recovery of costs for private process servers under 1920(1)). Although this change suggests that costs for private process servers should be recoverable, the Court is bound by the language of section 1920(1). Accordingly, Lakeland's costs for private process servers are not recoverable. Accord Viacao Aerea Sao Paulo v. Int'l Lease Finance Corp., 119 F.R.D. 435 (C.D. Cal. 1988).

Fairfield objects to Lakeland's request for \$7,151,50 for daily trial transcripts and computer conversion expenses. Such fees are properly taxable for "all or any part of the stenographic transcript necessarily obtained for use in the case." 28 USC 1920(2). The Court finds that the computer conversion and daily copy were

App. 59

for the convenience of counsel and were not necessary for use in the case. However, the Court will allow a reasonable rate of \$.75 per the 1,582 pages of transcripts for a total of \$1,186.50.

Lakeland seeks \$25,546.94 as costs associated with deposition transcripts. Fairfield contends that only six of these depositions were necessary for use in the case. The Court finds that the depositions for which Lakeland seeks costs were reasonably necessary for use in the case. The Court will allow as taxable costs the attendance fees, travel and mileage expenses, and postage costs attributable to the court reporter in the amount of \$2,229.83. However, the Court concludes that the costs of videotaping depositions that were also stenographically recorded (\$3,494.84)

App. 60

and the costs for storing certain depositions on disks (\$2,044.15) were incurred for the convenience of counsel and are therefore not recoverable.

Lakeland seeks taxation of \$695.86 for non-expert witness fees. Fairfield objects to \$223.86 for deposition attendance fees of non-expert witnesses. The Court finds that the depositions were reasonably necessary for use in the case and these costs are therefore recoverable.

Lakeland sought \$338,172.35 for expert witness fees under section 1920(3). Lakeland is not entitled to fees for its expert witnesses under section 1920(3). See Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987). However, pursuant to the Court's March 21 Order, Lakeland has submitted a supplemental memorandum with

App. 61

attached documentation to support taxation of its expert witnesses' costs within the limitations established in 28 USC §1821. Lakeland is entitled to witness attendance fees of \$30.00 per day, the witnesses' travel expenses, and a subsistence allowance of \$50.00 per day. Accordingly, the following costs are taxable for Lakeland's four expert witnesses:^{2/} \$150.00 in attendance fees, \$250.00 in subsistence allowances, and travel expenses in the amount of \$2863.40.^{3/}

Lakeland seeks taxation of \$4,261.02 for exhibits and photographs pursuant to §1920(4). Fairfield objects

^{2/} Dr. Yu testified on two days while the other three experts testified on one day.

^{3/}

App. 62

to Lakeland's claim for \$3,029.41 in charges for copies of Fairfield trial exhibits, \$750 for production of the videotape shown at trial, and \$377.36 for photo enlargements of exhibits. The Court finds that the copies of Fairfield's exhibits were not necessary for use in the case, but that the other expenses are recoverable. Accordingly, \$1,231.61 of these expenses are allowed.

Lakeland also seeks \$6,000.28 for photocopying expenses. Photocopying expenses constitute overhead and are not recoverable as costs. Lakeland seeks \$8,158.89 for computer costs, including computerized legal research, an \$29,318.94 for travel, lodging and subsistence expenses incurred by counsel and representatives of Lakeland. These expenses are not recoverable under section 1920 and are, therefore, not allowed.

App. 63

To summarize, Lakeland is entitled to \$7.50 as a service of summons fee, \$1,186.50 in court reporters' fees involving trial transcripts, \$20,007.95 for court reporters' fees involving depositions, \$695.86 for non-expert witness fees, \$3,263.40 for expert witness fees, and \$1,231.61 for exhibits and photographs. Accordingly, Lakeland is entitled to costs in the total amount of \$26,392.82.

Upon due consideration, therefore,
IT IS ORDERED:

1. Main's motion to alter or amend (doc #1394) and Fairfield's motion to alter or amend (doc #1396) are GRANTED. The Court's March 21 Order is AMENDED to sustain the taxation of Main's Bill of Costs in the amount of \$18,835.67 rather than \$93,004.06. The Clerk is directed to enter judgment accordingly.

App. 64

2. Lakeland's motion for reconsideration (doc #1397) is DENIED.

3. The taxation of costs in Lakeland's Bill of Costs is sustained to the extent of \$26,392.82, but in all other respects is withdrawn and set aside. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida
this 6th day of July, 1990.

/s/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

App. 65

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No. 83-1394-Civ-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,
a Delaware Corporation

v.

CITY OF LAKE LAND

JUDGMENT IN A CIVIL CASE

—
☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

—
☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

App. 66

IT IS ORDERED AND ADJUDGED The Court's order of March 21, 1990 is AMENDED to sustain the taxation of Main's Bill of Costs in the amount of \$18,835.67 rather than \$93,004.06. The taxation of costs in Lakeland's Bill of Costs is sustained to the extent of \$26,392.82, but in all other respects is withdrawn and set aside.

Date: August 7, 1990

David L. Edwards
Clerk

(By) Deputy Clerk

App. 67

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3368

ECODYNE COOLING DIVISION OF ECODYNE
CORPORATION,

Plaintiff-Counterclaim
Defendant,

versus

CITY OF LAKELAND,

Defendant-Counterclaim
Plaintiff-Appellee,

versus

ECODYNE COOLING DIVISION OF
ECODYNE CORP., etc.,
FAIRFIELD ENGINEERING,
ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, et al.,

Counterclaim Defendants,

FEDERAL INSURANCE COMPANY,

Counterclaim Defendant-
Appellant,

CHARLES T. MAIN, INC.,

Counterclaim Defendant,
Third-Party Plaintiff,

versus

THE MUNTERS CORPORATION, et al.,

Third-Party Defendants.

Appeal from the United States District
Court for the Middle District of Florida

Before TJOFLAT, Chief Judge, ANDERSON
and CLARK, Circuit Judges.

BY THE COURT:

This series of appeals was taken from the district court's judgment and amended judgment for attorney's fees and costs for the second phase of this complex litigation which arose from the construction of a power plant in the City of Lakeland, Florida. For the reasons that follow, we conclude that two of these appeals must be dismissed.

Federal Insurance Company filed appeal No. 90-3368 on April 20, 1990,

App. 69

from the district court's original judgment for attorney's fees and costs in the action. At that time, however, the parties' timely served motions to alter or amend the judgment were still pending in the district court. Since it is settled that a notice of appeal filed prior to the disposition of such motions is premature and ineffective, this appeal must be dismissed for lack of jurisdiction. Fed.R.App.P. 4(a)(4); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed. 2d 225 (1982); Campbell v. Wainwright, 726 F.2d 702, 703 (11th Cir. 1984).

* * *

Lakeland filed appeal No. 90-3727 on August 3, 1990, following the district court's disposition of the post-judgment motions but prior to the

App. 70

entry of the district court's amended judgment on the docket on August 7. Federal and Fairfield Engineering filed a notice of appeal on September 7, thirty-one (31) days after entry of the amended judgment.

The Supreme Court has held that "a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion" Acosta v. Louisiana Department of Health & Human Resources, 478 U.S. 251, 254, 106 S.Ct. 2876, 2878, 92 L.Ed.2d 192 (1986) (per curiam). Therefore, Lakeland's notice of appeal was premature and ineffective. Moreover, the appeal filed by Federal and Fairfield was one day late, and that appeal must also be dismissed for lack of jurisdiction.

* * *

App. 71

The district court entered an order on January 10, 1991, granting Lakeland's motion for Fed.R.Civ.P. 54(b) Certification of its amended judgment for attorney's fees and costs. Appeals were filed by Lakeland and by Federal and Fairfield from that order, and they have been docketed under our case No. 91-3185. However, once the underlying judgment has been certified for immediate review, it is not clear that the district court needs to certify an order respecting attorney's fees and costs. Generally, only substantive claims have been considered considered certifiable under Rule 54(b). See 6 Moore's Federal Practice ¶ 54.33[2] (2d ed. 1990). Moreover, while the district court noted that it had previously directed the Clerk to enter a separate judgment, the

App. 72

court did not make the express determination that there was no just reason for delay in entering the judgment. See In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338, 1339-40 (11th Cir. 1982) (per curiam). However, this Court has held that the district court may vacate and reenter its judgment pursuant to Fed.R.Civ.P. 60(b) to permit a timely appeal. See Harnish v. Manatee County, Florida, 783 F.2d 1535, 1538 (11th Cir. 1986). Accordingly, the district court's certification order is construed as such an order, and appeal No. 91-3185 MAY PROCEED.

App. 73

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-3368

ECODYNE COOLING DIVISION OF ECODYNE
CORPORATION,

Plaintiff-Counterclaim
Defendant,

versus

CITY OF LAKELAND,

Defendant-Counterclaim
Plaintiff-Appellee,

versus

ECODYNE COOLING DIVISION OF
ECODYNE CORP., etc.,
FAIRFIELD ENGINEERING,
ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, et al.,

Counterclaim Defendants,

FEDERAL INSURANCE COMPANY,

Counterclaim Defendant-
Appellant,

CHARLES T. MAIN, INC.,

Counterclaim Defendant,
Third-Party Plaintiff,

versus

THE MUNTERS CORPORATION, et al.,

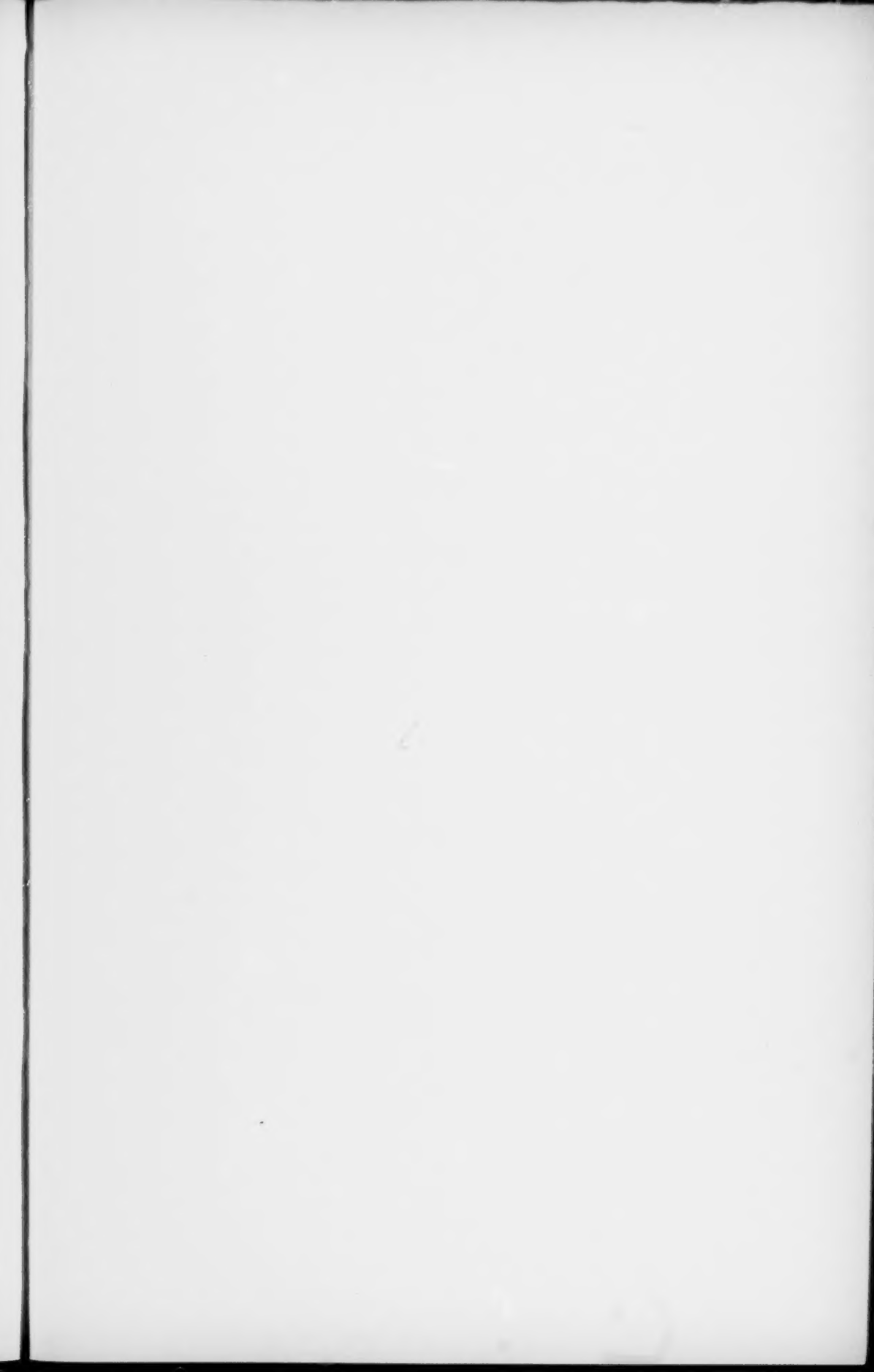
Third-Party Defendants.

Appeal from the United States
District Court for the
Middle District of Florida

Before JOHNSON, ANDERSON and BIRCH,
Circuit Judges.

B Y T H E C O U R T:

Petition for Rehearing of
Appellants, Fairfield Engineering
Company and Federal Insurance Company
(construed as a Motion for Reconsider-
ation of this Court's order of June 19,
1991), is denied.



(2)
No. 91-693

Supreme Court, U.S.
FILED
NOV 25 1991
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FEDERAL INSURANCE COMPANY,
Petitioner,

vs.

CITY OF LAKELAND,
Respondent.

Petition for Writ of Certiorari To The
United States Court of Appeals For The
Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN L. BRANNOCK
(Counsel of Record)
KAROL K. WILLIAMS
HOLLAND & KNIGHT
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500
Attorneys for Respondent

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF CASE	3
Background	3
The Attorneys' Fees and Costs Award - The March 21, 1990 Order and Judgment	4
The Rule 59 and 52(b) Motions	5
Federal's April 20, 1990 Notice Of Appeal	6
The Attorneys' Fees and Costs Award - The July 6, 1990 Amended Order and The August 7, 1990 Amended Judgment	7
The 54(b) Certification Motion and Subsequent Notices of Appeal	8
The 54(b) Certification Order and Additional Notices of Appeal	9
The Eleventh Circuit Order . . .	9
SUMMARY OF THE ARGUMENT	11

REASONS FOR DENYING THE WRIT	14
I. The Eleventh Circuit Correctly Dismissed Federal's April 20, 1990 Appeal From The March 21, 1990 Attorneys' Fees Judgment	14
II. This Complex, Procedurally Tortured Case Does Not Present a Proper Opportunity For The Court To Establish a Brightline Rule Regarding The Finality of Attorneys' Fees Orders or Judgments	21
CONCLUSION	29
APPENDIX	App.1

TABLE OF AUTHORITIES

CASES

PAGE(S)

<u>Thompson v. Immigration & Naturalization Service,</u> 375 U.S. 384, 84 S. Ct. 397, 11 L. Ed 2d 404 (1965)	25
--	----

Other

Rule 52(b), Fed. R. Civ. P. . . .	passim
Rule 54(b), Fed. R. Civ. P. . . .	passim
Rule 59(e), Fed. R. Civ. P. . . .	passim
Rule 60(b), Fed. R. Civ. P. . . .	passim
Rule 4(a)(4), Fed. R. App. P. . .	passim

CITY OF LAKE LAND'S BRIEF IN OPPOSITION

INTRODUCTION

In its petition for writ of certiorari, Federal Insurance Company seeks to save an appeal that was never lost. Ignoring most of the complicated procedural history below, Federal neglects to inform this Court that Federal still has a valid appeal of the attorneys' fees judgment before the Eleventh Circuit, despite the court's dismissal of its defective April 20, 1990 appeal. Thus, the issues raised here are of purely academic interest. Moreover, this Court should deny Federal's petition because the result reached by the challenged Eleventh Circuit order was both just and correct under the circumstances of this complex, procedurally tortured lawsuit. Any review by this Court would

needlessly entangle the Court in the resolution of complicated, moot jurisdictional issues underlying the dismissed appeals --- without benefit to any party to the appeals below or to future litigants. This Court should deny Federal's petition.

In its response to Federal's petition for writ of certiorari, the City of Lakeland will be referred to as "Lakeland". Federal Insurance Company will be referred to as "Federal" and Chas. T. Main, Inc. and Fairfield Engineering Company, Federal's co-counterdefendants below, will be referred to as "Main" and "Fairfield", respectively. Federal's appendix will be referred to as "A-(page number)" and Lakeland's appendix will be referred to as "L-(page number)".

STATEMENT OF CASE AND FACTS

Background

This case arises from a complex multi-claim, multi-party omnibus lawsuit concerning the construction of a power plant for the City of Lakeland, Florida. In the action below, the United States District Court for the Middle District of Florida grouped the multiple claims below into several component claims, each component claim dealing with a particular power plant operational system. The component claims were then set for separate trials.

Federal's petition for writ of certiorari concerns Federal's appeal of an attorneys' fees award granted postjudgment in one of the severed component trials --- the trial

concerning the coal handling system for the power plant. One year after judgment (the "Coal Judgment") was entered for Lakeland in the coal claims trial, the district court entered a March 21, 1990 order ("Order") regarding postjudgment motions for attorneys' fees and costs filed by Lakeland and another party to the coal claims trial, Chas. T. Main, Inc. (A-1).

The Attorneys' Fees and Costs
Award - The March 21, 1990
Order and Judgment

The March 21, 1990 Order addressed both the fees and costs issues raised by the parties' motions (A-1). The Order granted a certain amount of attorneys' fees in favor of Lakeland and against Federal, but denied Main's request for attorneys' fees. (A-29). The Order determined the amount of Main's costs award, but deferred ruling on Lakeland's costs until Lakeland produced

certain documentation for the trial court's consideration (A-30-31). The Order also instructed the clerk to enter judgment for attorneys' fees in accordance with the Order (A-29). A judgment ("Judgment") for attorneys' fees was entered on March 21, 1990 (A-32).

The Rule 59 and 52(b) Motions

On March 29, 1990, Main filed a motion to alter or amend pursuant to Federal Rule of Civil Procedure 59(e), requesting the court to alter or amend "its Judgment and Order entered March 21, 1990" by including additional taxable costs in favor of Main (A-42). On April 4, 1989, Federal¹ filed

¹ Federal's motion to alter or amend was filed jointly with its co-counterclaim defendant, Fairfield Engineering Company. Federal is the insurer of Fairfield. Since Fairfield's participation in the lawsuit below is not material to the issues before this Court, any joint filings by Federal and Fairfield will be referred to as Federal filings only.

a motion to alter or amend requesting the trial court "to alter or amend the Judgment and Order entered March 21, 1990" by correcting a mathematical error in the trial court's computation of costs to Main (A-35). Lakeland filed on April 6, 1990, a motion to reconsider the amount of its March 21, 1990 attorneys' fees award pursuant to Federal Rule of Civil Procedure 52(b), requesting the court to increase Lakeland's fees award.

Federal's April 20, 1990
Notice of Appeal

Federal filed a notice of appeal from the Judgment on April 20, 1989 (A-46). The notice of appeal was filed during the pendency of the above described Rule 59 and 52(b) motions.

The Attorneys' Fees and Costs
Award - The July 6, 1990
Amended Order and the August
7, 1990 Amended Judgment

On July 6, 1990, the trial court amended its March 21, 1990 Order ("Amended Order") after ruling on the parties' pending motions (A-49). The July 6, 1990 Amended Order granted Federal's and Main's motions to alter or amend, but denied Lakeland's 52(b) motion as untimely (A-63-64). The court additionally determined Lakeland's costs award (A-64). The Amended Order further directed the clerk to enter judgment reflecting the court's amendment of the March 21, 1990 Order concerning Main's costs award, and to enter judgment for costs to Lakeland (A-63-64). An amended judgment ("Amended Judgment") was entered accordingly on August 7, 1990 by the clerk (A-65). The trial court did not,

however, certify the the fees and costs award for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b).²

The 54(b) Certification
Motion and Subsequent
Notices of Appeal

On August 3, 1990, Lakeland filed a motion for 54(b) certification of the Amended Order on fees and costs.³ In an abundance of caution to protect Lakeland's

² The trial court had previously certified the Coal Judgment for immediate appeal pursuant to Rule 54(b). Fairfield/Federal's timely filed appeal of the Coal Judgment is pending before the Eleventh Circuit.

³ Other component claims in the omnibus lawsuit --- with their own attendant attorneys' fees and costs claims --- were still pending unresolved before the district court at the time the Amended Order and Amended Judgment were entered. Under these circumstances, Lakeland believed the instant award of attorneys' fees and costs relating to the Coal Judgment lacked the requisite finality for immediate appeal without 54(b) certification.

right to appeal the attorney' fees award, Lakeland also filed a notice of appeal from the Amended Order on August 3, 1990 (L-1). Federal filed a notice of appeal from the Amended Judgment on September 7, 1990 (L-4).

The 54(b) Certification Order
and Additional Notices
of Appeal

Several months later, on January 9, 1991, the trial court granted Lakeland's motion for 54(b) certification of the Amended Order (L-7). Both Lakeland and Federal again filed notices of appeal from the 54(b) certified Amended Order and Amended Judgment on February 8, 1991 (L-12, 16).

The Eleventh Circuit Order

The Eleventh Circuit addressed this series of appeals from the fees and costs awards in an order entered on June 19, 1991

(the "Eleventh Circuit Order") (A-67). The Eleventh Circuit dismissed all of the pending appeals for various jurisdictional defects except the parties' most recent appeals filed on February 8, 1991 (L-12, 16). The Eleventh Circuit Order additionally construed the trial court's order granting 54(b) certification of the fees and costs award as an order vacating and reentering the Amended Judgment on attorneys' fees and costs, pursuant to Federal Rule of Civil Procedure 60(b) (A-72). The court's stated purpose for this construction was to preserve the appeals of both Lakeland and Federal (A-72).

The Eleventh Circuit Order left both Lakeland and Federal with valid appeals of the attorneys' fees and costs award pending before the Eleventh Circuit. Federal, nonetheless, filed a motion for rehearing

regarding the Eleventh Circuit's dismissal of Federal's initial April 20, 1990 notice of appeal of the Judgment. Federal's motion for a rehearing --- construed by the Eleventh Circuit as a motion for reconsideration --- was denied on July 26, 1991 (A-74). Federal's Petition to this Court followed.

SUMMARY OF THE ARGUMENT

Federal's petition for writ of certiorari must be denied by this Court for several reasons. First, Federal cannot be permitted to abandon its prior treatment of the district court's Order and Judgment as a single judicial act merely because Federal now finds it to its advantage to challenge a portion of the Eleventh Circuit Order. Federal's post fee award motion addressed both the Order and the Judgment, and tolled the time for appeal of all the issues

addressed in the court's Order and Judgment.

Additionally, the issues raised by Federal's petition are moot in this lawsuit. Federal does not challenge the Eleventh Circuit's ruling that the fees Judgment was vacated and reentered by the district court on January 9, 1991. This Court's review of the disposition of Federal's earlier filed appeal is clearly pointless, particularly where Federal has not lost its appeal of the fees award.

Finally, the Eleventh Circuit's dismissal of all of the earlier-filed duplicative appeals correctly resolved a potential procedural quagmire of jurisdictional issues underlying the dismissed appeals. The Eleventh Circuit Order efficiently freed the parties' later filed appeals of the attorneys' fees judgment from a tangle

of procedural issues --- correctly permitting the fees appeals to move forward toward resolution. A grant of Federal's petition would only force the parties, this Court, and the Eleventh Circuit into a meritless confrontation of these complicated issues.

Certainly no brightline rule for future litigants can possibly emerge from the contorted procedural posture of this case, nor will a decision in Federal's favor "restore" any lost right of appeal to Federal. This Court, therefore, should not disturb the correct result reached below in this complex multi-party, multi-claim lawsuit. Federal's petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

- I. THE ELEVENTH CIRCUIT CORRECTLY
DISMISSED FEDERAL'S APRIL 20,
1990 APPEAL FROM THE MARCH 21,
1990 ATTORNEYS' FEES JUDGMENT.

Federal's petition to this Court is, at best, a hollow academic exercise addressing empty issues in this lawsuit. The unchallenged portions of the Eleventh Circuit Order retaining Federal's later, identical appeal of the attorneys' fees Judgment effectively moot any attempt by Federal to reinstate an appeal that was never lost. Federal's instant attempt to quibble over which of its series of duplicative notices of appeals is, in fact, the "real" notice of appeal is simply meaningless where Federal's appeal of the fees Judgment was fully preserved by the

Eleventh Circuit Order and is pending before that court today.

In fact, the Eleventh Circuit Order did no more than correctly preclude Federal from pursuing an improper piecemeal appeal of Lakeland's attorneys' fees award. The Eleventh Circuit Order dismissing Federal's premature notice of appeal implicitly and correctly ruled that a timely served Rule 59 motion tolls the appeal time for all issues addressed in an order, regardless of whether the Rule 59 motion concerns the particular issue sought to be appealed. Federal's attempt to artificially divide the Order addressing fees and costs into separate, individually appealable judgments is nothing more than a strained attempt to invite this Court's review of issues already efficiently resolved by the Eleventh Circuit. Neither the record

Procedure, nor the caselaw supports Federal's argument.

The record below reveals that both the district court's Order and Amended Order evinced the trial court's clear intent to address the pending fees and cost issues in a single amended judgment. The March 21, 1990 Order left no doubt that a later ruling on costs taxation would be forthcoming. Indeed, the Amended Order expressly amended the March 21, 1990 Order to include the court's decision on costs and expressly directed the clerk "to enter judgment accordingly" (A.63). The clerk thus correctly reflected the court's intent in entering the Amended Judgment on August 7, 1990 in accordance with the court's Amended Order.

Further, all of the parties at the time the Order and Judgment were entered treated

the Order and Judgment as one. Their Rule 59 and Rule 52(b) motions uniformly requested the district court to alter or amend or reconsider both the Order and the Judgment. Federal's own motion to alter or amend expressly asked the district court to "alter or amend the Judgment and Order entered March 21, 1990" (A-35) (emphasis added). Federal cannot be permitted to file a 59(e) motion specifically referencing both the Judgment and Order and then suddenly change its position to now claim that the 59(e) motion was directed only to the order and had no tolling effect on the judgment.

If this Court agreed with Federal's reasoning, parties would no longer be able to automatically rely on 59(e) motions to toll the time for appeal. Orders, judgments and tolling motions would have to

be cross-referenced for a careful match of motions to issues sought to be appealed. Should any ambiguity or uncertainty arise, protective notices of appeal would have to be filed to preserve the party's right of appeal. The appellate courts would be asked to scrutinize countless motions tolling the time for appeal under Federal Rule of Appellate Procedure 4(a)(4) to determine, issue by issue, the timeliness of a party's appeal. Such an undesirable result clearly must be avoided by this Court.⁴

⁴Additionally, Federal's attempt to split hairs over whether the district court's March 21, 1990 Order was an appealable Rule 58 "judgment" is overly technical and unsupported by the language of the Rules. Federal Rule of Civil Procedure 54(a) plainly states that "'judgment' as used in these rules includes a decree and any order from which an appeal lies" (emphasis added). Thus, the Federal Rules of Civil Procedure clearly contemplate and permit the appeal of orders as well as judgments.

Even if this Court disagreed with the Eleventh Circuit's reasoning in determining that Federal's April 20, 1990 notice of appeal was a legal nullity, the Eleventh Circuit, nonetheless reached a correct result. The Eleventh Circuit Order heeded the oft-repeated judicial admonishment that "procedural rules are not meant to be a trap for the unwary" and correctly preserved both Federal's and Lakeland's right to appeal the fees and costs awards---despite the disagreement between the parties as to the particular point at which the awards became final and appealable over the lengthy course of this complex lawsuit.

The Eleventh Circuit, in fact, eliminated this disagreement among the parties by effectively nullifying all of the appeals filed prior to the trial court's January

9, 1991 vacation and reentry of the attorneys' fees and costs award. Importantly, Federal has not petitioned this Court for review of the Eleventh Circuit's construction of the trial court's 54(b) certification order as a Rule 60(b) order. Thus, the issues proposed by Federal for this court's review have, in fact, been mooted by the unchallenged portion of the Eleventh Circuit Order deeming the Judgment to have been vacated and reentered on January 9, 1991.

Clearly, then, Federal's petition makes much ado about nothing. Though Federal argues that the Eleventh Circuit erred in dismissing its April 20, 1990 notice of appeal, Federal has not and cannot claim any loss or prejudice arising from the alleged error. The plain fact before this Court is that Federal seeks to revive an

appeal which is already safely revived by the Eleventh Circuit Order. Thus, Federal's Petition raises, at most, issues of possible academic interest, but of no real import to the lawsuit below.

Federal's right to appeal the attorneys' fees Judgment, as amended by the Amended Judgment, and vacated and reentered by the trial court on January 9, 1991, remains fully preserved by the unchallenged portion of the Eleventh Circuit Order.

Federal's appeal of the fees award is, in fact, currently pending before the Eleventh Circuit.

II. THIS COMPLEX, PROCEDURALLY TORTURED CASE DOES NOT PRESENT A PROPER OPPORTUNITY FOR THE COURT TO ESTABLISH A BRIGHTLINE RULE REGARDING THE FINALITY OF ATTORNEYS' FEES ORDERS OR JUDGMENTS.

Federal seeks to enmesh this Court in a procedurally complicated case involving additional jurisdictional twists and

tangles outside the scope of review established by Federal's petition. The Eleventh Circuit Order properly eliminated these jurisdictional pitfalls to the parties' appeals by eliminating all of the parties' prior notices of appeal. If this Court should rule in favor of Federal on the issues presented in Federal's petition, the appellate courts' judicial labor would not be at an end. Indeed, a ruling favorable to Federal opens a Pandora's box of issues that would also have to be resolved by this Court or the Eleventh Circuit.

At the very least, this Court would additionally have to determine whether the March 21, 1989 Order and Judgment needed 54(b) certification from the district court, and even whether the Order and

Judgment could be considered a final order and judgment.

The instant fees Judgment was certainly not a final fees judgment within the context of the multi-claims omnibus lawsuit. Several component merits claims remained pending before the trial court at the time the instant Judgment was entered. Each of these pending component claims involved a potential claim for attorneys' fees by the prevailing party. Thus, judicial labor concerning the grant of attorneys' fees in the omnibus lawsuit was far from finished on March 21, 1990, the date the fees Judgment was entered.

Even within the narrower context of the appeals below, the March 21, 1990 Order and Judgment may have lacked the requisite finality for appellate jurisdictional purposes. This Court would have to

determine whether the Judgment was actually an unappealable interlocutory judgment prior to its amendment on August 7, 1990 to reflect the trial court's Amended Order --- the trial court's final order ending all judicial labor on the parties' collateral post-Coal Judgment claims.

Numerous issues would also remain for resolution by the Eleventh Circuit. For example, the Eleventh Circuit would have to determine the effect of this Court's favorable ruling for Federal on all of the subsequent notices of appeal filed by the parties. The court would have to decide whether Lakeland's first notice of appeal filed on August 3, 1989, was timely and, if not, whether it could be considered a valid cross appeal, or whether the untimely appeal should be allowed under the Thompson

exception.⁵ The court below would also have to deal with the set of appeals already validated by the court in its June 19, 1991 Order.

Clearly, in view of the complexity of the above described procedural circumstances of this case, a favorable ruling for Federal on the issues raised in Federal's petition will not suffice to "clarify" the tortured procedural posture of this case. Quite the opposite, a reversal of the Eleventh Circuit's resolution of this series of appeals would

⁵ See Thompson v. Immigration & Naturalization Service, 375 U.S. 384, 84 S. Ct. 397, 11 L. Ed 2d 404 (1965). Lakeland filed its Rule 52(b) motion to reconsider on April 6, 1990 in reliance on the trial court's prior ruling regarding a timely filing of such a motion. In its December 8, 1989 order, the trial court had previously held that the three day mail time extension provided by Federal Rule of Civil Procedure 6(e) was applicable to appeal time-tolling postjudgment motions.

plunge the parties back into an appellate abyss of jurisdictional challenges and needless delay.

More importantly to this Court, however, a grant of Federal's petition fails to provide this court with an appropriate opportunity to announce any brightline rule to guide future litigants regarding the alleged issues raised by Federal. Assuming for the sake of argument that there was some confusion or conflict among the circuits regarding the applicability of Federal Rules of Civil Procedure 58 and 59 and Federal Rule of Appellate Procedure 4(a)(4) to postjudgment collateral fees and costs awards, the instant case is far too procedurally tangled to showcase a clear rule by the Court in support of either the Eleventh Circuit Order or in favor of Federal.

Similiarly, even if this Court agreed with Federal's contorted contention that the Eleventh Circuit's dismissal of its April 20, 1990 notice of appeal conflicted with the "principles behind the Court's rulings" in prior cases,⁶ the complex posture of the instant case precludes any meaningful resolution of the alleged conflict. Briefly stated, Federal's petition concerns a premature appeal of a postjudgment fees award which was assailed by Rule 59 motions regarding a postjudgment costs issue, addressed but unresolved by the Order creating the fees award, and by a Rule 52(b) motion which was untimely because of the party's reliance on a prior erroneous ruling on timeliness by the court --- all within the context of a

⁶ See cases cited in Federal's Petition at 25-26.

multi-claim, multi-party, multi-judgment omnibus lawsuit with pending unresolved claims encompassing unresolved attorneys' fees claims. Despite Federal's suggestion to the contrary, Lakeland submits that the complexity and interplay of this multitude of procedural and factual circumstances clearly fail to offer fertile ground for this Court to sow seeds of clarity on any issue --- and certainly not on Federal's alleged "issue" of the interplay between the tolling provisions of Federal Rule of Appellate Procedure 4(a)(4) and Rule 59(e) motions.

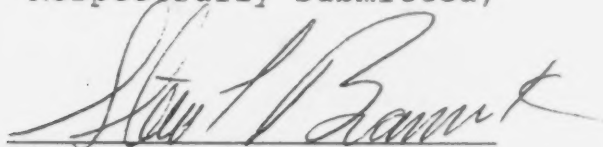
Should this Court deny Federal's petition, both Federal and Lakeland will remain substantively unscathed by the denial. Instead, their respective appeals of the fees award will be free to proceed unimpeded toward a just resolution before

the Eleventh Circuit. Any other disposition by this Court would unnecessarily torture fundamental principles of judicial economy supporting a fair, efficient judicial disposition of the instant case.

CONCLUSION

For all the foregoing reasons, Lakeland urges this Court to deny Federal's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Steven L. Brannock", is written over a horizontal line.

Steven L. Brannock
(Counsel of Record)
Karol K. Williams
Holland & Knight
P.O. Box 1288
Tampa, Florida 33601
(813) 227-8500
Attorneys for Respondent

APPENDIX

Appendix Table of Contents

Page 1	City of Lakeland's August 3, 1990 Notice of Appeal
Page 4	Federal Insurance Company's and Fairfield Engineering Company's September 7, 1990 Notice of Appeal
Page 7	District Court's January 9, 1991 Order granting 54(b) Certification
Page 12	City of Lakeland's February 8, 1991 Notice of Appeal
Page 16	Federal Insurance Company and Fairfield Engineering Company's February 8, 1991 Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10
Coal Handling System Claim

ECODYNE COOLING DIVISION
OF ECODYNE CORPORATION,
a Delaware Corporation

Plaintiff,

v.

CITY OF LAKELAND,

Defendant/Counterclaimant,
Appellant,

v.

FAIRFIELD ENGINEERING CO.,
FEDERAL INSURANCE CO.

Counterclaim/Defendants.
Appellees.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the City of
Lakeland, counterplaintiff, appellant,
appeals to the United States Court of
Appeals for the Eleventh Circuit from the
final judgment dated March 21, 1990, as

amended by the Court's order of July 6, 1990. The nature of the order is a final judgment denying in part Lakeland's claim for attorneys' fees against counterdefendant, appellee, Federal Insurance Company. This notice of appeal is filed for protective purposes only. The March 21, 1990 order (as amended) has not been certified by the District Court for immediate appeal under Section 54(b), Federal Rules of Civil Procedure. This notice has been filed to preserve Lakeland's right of appeal in the event the District Court and the Eleventh Circuit Court of Appeals hold that Section 54(b) certification by the District Court is unnecessary.

Respectfully submitted,

Steven L. Brannock
Florida Bar No. 319651

Michael B. Colgan
Florida Bar No.191383
Richard M. Blau
Florida Bar No. 347167
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500

Attorneys for City of
Lakeland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail to Denise G. Morris, Esquire and Jeffrey D. Keiner, Esquire, Fisher, Rushmer, Warrenrath, Keiner, Wach & Dickson, P.A., Post Office Box 712, Orlando, Florida 32802; and to John L. Ashworth, Esquire and Ted G. McKinniss, Ashworth & McKinniss, 255 Executive Drive, Marion, Ohio 43302, on this 3th day of August, 1990.

Steven L. Brannock
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

vs.

CITY OF LAKELAND,

Defendant/Counter-
claimant,

vs.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, et. al.

Counterclaim
Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Fairfield Engineering Company, and Federal Insurance Company, counterclaim defendants and cross-claimant, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from:

1. The Judgment for costs in favor of counterclaimant City of Lakeland in the amount of \$26,392.82 and in favor of cross-claim defendant Chas. T. Main Company in the amount of \$18,835.67, which judgment was entered herein on August 7, 1990.

Respectfully submitted,

John L. Ashworth
ASHWORTH & MCKINNISS
255 Executive Drive
Marion, Ohio 43302
Telephone: (614) 387-0692

- and-

MACFARLANE, FERGUSON,
ALLISON & KELLY
P.O. Box 1531
Tampa, Florida 33601
Telephone: (813) 223-2411

By:

D. James Kadyk, Esquire
Florida Bar Number 238325

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail this 7th day of September, 1990, upon all persons named in the attached Service List.

D. James Kadyk,
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

vs.

CITY OF LAKE LAND,

Defendant/Counterclaimant

vs.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, etc, et. al.,

Counterclaim Defendants.

O R D E R

Before the Court is a motion, pursuant to Rule 54(b), F.R.Civ.P., by the City of Lakeland for certification of the Order entered on March 21, 1990 (as amended by the Order entered on July 6, 1990).

On March 2, 1989, the Court entered a judgment in the coal handling portion of

this case in favor of Lakeland on its claims against Fairfield and Federal, and in favor of Main on Fairfield's cross-claim. The Court certified the judgment on the merits pursuant to Rule 54(b), F.R.Civ.P. On March 21, 1990, the Court granted in part and denied in part Lakeland's motion for attorney's fees and awarded costs to Main against Fairfield and Federal. The March 21 Order directed the Clerk to enter Judgment with respect to Lakeland's claim for attorney's fees.

On April 20, 1990, Federal filed a notice of appeal of the March 21 Judgment on attorney's fees. Main, Fairfield and Federal moved to alter or amend the March 21 Order with respect to the award of costs to Main. Lakeland moved, pursuant to Rule 52(b), F.R.Civ.P., for reconsideration of the award of attorney's fees. On July 6,

1990, the Court denied Lakeland's motion as untimely, amended the costs awarded to Main, and awarded costs to Lakeland. On August 3, 1990, Lakeland filed a protective notice of appeal from the Judgment entered on March 21, 1990, but also moved to certify the March 21 Order pursuant to Rule 54(b). On August 7, 1990, the clerk entered an "Amended Judgment" with respect to costs, pursuant to the Court's direction in the July 6 Order. And on September 7, 1990 Fairfield and Federal filed a notice of appeal from the August 7 Judgment.

As both Federal and Lakeland seek to appeal the Court's determination with respect to Lakeland's petition for attorney's fees, the only issue is whether Rule 54(b) certification is necessary. Federal contends that the Court's Rule 54(b) certification of the March 1989

Judgment on the merits would encompass the subsequent cost and attorney fee orders entered in connection with the trial of the coal handling claims. Federal contends further that certification is unnecessary because the Court's attorney's fee determination is appealable as a collateral order under the Cohen doctrine. Finally, Federal urges the Court to simply allow the Eleventh Circuit Court of Appeals to resolve the issue.

The Court has already directed the Clerk to enter Judgment on the March 21 and July 6 Orders. The Court did not, however, certify these Orders pursuant to Rule 54(b). Upon due consideration, Lakeland's motion for certification pursuant to Rule 54(b) is GRANTED. The Judgments entered on March 21 and August 7 are certified pursuant to Rule 54(b).

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida,
this 9th day of January, 1991.

Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

vs.

CITY OF LAKELAND,

Defendant/Counterclaimant,
Appellee/Appellant,

vs.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, et. al.

Counterclaim/Defendants.
Appellants/Appellees.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the City of Lakeland, Counterplaintiff, Appellant, appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment dated March 21, 1990, as amended by the Court's Order of July 6,

1990, and as certified as a final judgment pursuant to Federal Rule of Civil Procedure 54(b) by the trial court on January 9, 1991. The nature of the Order is a final judgment denying in part Lakeland's claim for attorneys' fees against counterdefendant, Appellee, Federal Insurance Company.

This Notice of Appeal is filed for protective purposes only. Lakeland is filing this Notice of Appeal because Lakeland is informed that appellees may argue that the trial judge does not have the power to consider Lakeland's Motion to Alter or Amend the Final Judgment, filed on January 22, 1991, pursuant to Federal Rule of Civil Procedure 59(e). Appellees may, therefore, assert that Lakeland's Rule 59(e) Motion to Alter/Amend the Final

Judgment does not toll the time for appeal.

Respectfully submitted,

Steven L. Brannock
Florida Bar No. 319651
Michael B. Colgan
Florida Bar No. 191383
Richard M. Blau
Florida Bar No. 347167
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500

Attorneys for City of
Lakeland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail this 8th day of February, 1991, to Mark N. Miller, Esquire, City Hall, 228 S. Massachusetts Avenue, Lakeland, Florida 33802, John L. Ashworth, Esquire, Ashworth & McKinniss, 255

Executive Drive, Marion, Ohio 43302, Joseph
H. Lowe, Esquire, Marlow, Shofi, Connell,
Valerius, Abrams, Lowe & Adler, 2950
Southwest 27th Avenue, Coconut Grove,
Miami, Florida 33133, and Richard J.
Ovelman, Esquire, Baker & McKenzie, 701
Brickell Avenue, Suite 1600, Miami, Florida
33131.

Karol K. Williams
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

vs.

CITY OF LAKELAND,

Defendant/Counter-
claimant,

vs.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, et. al.

Counterclaim
Defendants.

_____ /

NOTICE OF APPEAL

Notice is hereby given that Fairfield Engineering Company ("Fairfield"), and Federal Insurance Company ("Federal"), counterclaim defendants and cross-claimants, hereby appeal to the United States Court of Appeals for the Eleventh

Circuit. This notice of appeal is filed for protective purposes only. Fairfield and Federal appeal from:

1. The Judgment in a Civil Case in favor of plaintiff City of Lakeland and against Fairfield and Federal entered on March 21, 1990 for attorney's fees of \$109,485.10.
2. The order in a Civil Case in favor of plaintiff City of Lakeland and against Fairfield and federal entered on March 21, 1990 for attorney's fees of \$109,485.10.
3. The Judgment in a Civil Case in favor of plaintiff City of Lakeland and courterclaim defendant Chas. T. Main, and against Fairfield and Federal entered on August 7, 1990 for costs of \$26,392.82; and \$18,835.67.
4. The Order in a Civil Case in favor of plaintiff City of Lakeland and counterclaim defendant Chas. T. Main, and against Fairfield and Federal entered on July 6, 1990 for costs of \$26,392.82; and \$18,835.67.
5. The Order of this court entered on January 9, 1991, relating to Lakeland's Motion for

Certification pursuant to Rule 54(b) of March 21 and August 7, 1990 Judgments.

6. All prior orders and rulings which produced the aforementioned judgments.

Respectfully submitted,

John L. Ashworth
ASHWORTH & MCKINNISS
255 Executive Drive
Marion, Ohio 43302
Telephone: (614) 387-0692

- and -

MACFARLANE, FERGUSON,
ALLISON & KELLY
P.O. Box 1531
Tampa, Florida 33601
Telephone: (813) 223-2411

By:

D. James Kadyk, Esquire
Florida Bar Number 238325

Dated: February 8, 1991

